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STATE OF CALIFORNIA

NEW MOTOR VEHICLE BOARD

In the Matter of the Protest of DEPENDABLE DODGE, INC., Protestant, vs. FIAT CHRYSLER AUTOMOBILES, INC., Respondent.	**Protest Nos: PR-2435-15 and PR-2436-15** **RESPONDENT FCA US LLC'S REPLY BRIEF TO PROTESTANT'S POST-HEARING BRIEF**

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Respondent FCA US LLC ("FCA US") submits this Reply Brief Responding to Protestant's Opening Brief in connection with the protest commenced by Dependable Dodge, Inc. d/b/a Dependable Dodge ("DDI"). This brief is in response to DDI's December 15, 2016 Post-Hearing Opening Brief ("DDI's Opening Brief") and in further support of FCA US's simultaneously filed Opening Brief ("FCA US's Opening Brief"). As explained in detail in FCA US's Opening Brief, and as further supplemented by this Reply Brief, FCA US has demonstrated numerous reasons why good cause exists under California Vehicle Code[1] Section 3061 to end FCA US's business relationship with DDI.

I. INTRODUCTION

DDI's Post-Hearing Brief fails to address the majority of the evidence presented by FCA US at the Hearing, and offers only a few arguments in purported support of its case that it then repeats numerous times throughout DDI's Post-Hearing Brief. Moreover, these arguments are made with little factual support or citation to the record created at the Hearing. Indeed, many arguments are made with no evidentiary support whatsoever and are wholly contradicted by the record. DDI spends much of its briefing attempting to shift the Board's focus away from the merits of this proceeding and the requirement that the Board consider all existing circumstances, including all seven statutory factors discussed below. Instead, DDI relies on distraction techniques ranging from claims of discovery problems to contrived conspiracy theories and accusations that most of FCA US' witnesses (including its experts and third-parties) lied at the Hearing. In its Post-Hearing Brief, DDIalso attempted to make this case exclusively about sales, which was a tactical error, as will be described below.

DDI spends nearly 30 pages of its opening brief attacking FCA US' Minimum Sales Responsibility ("MSR")[2], in a misguided effort to argue its sales really were not that bad. DDI's effort in this regard failed. In fact, the effort did little more than highlight DDI's operational

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[1] Unless otherwise indicated, all subsequent statutory references are to the provisions of the California Vehicle Code.

[2] MSR is the standard used to measure a dealership's sales. MSR is explained in detail in the Sales and Service Agreement ("Dealer Agreement") entered into between DDIand FCA US.

downfalls. DDI's attacks on MSR are all premised on its own business decisions and operational errors, including poor location, poor facility, poor advertising, and not having a full line-up of FCA US brands. DDI takes the position that these operational failures support the conclusion that DDI should not be held to its contractually required MSR. DDI's blind focus on only one of the seven statutory factors at issue was misguided. Not only is its attack on MSR unavailing but, the evidence offered by DDI to attack MSR is the exact evidence that supports termination under the other six statutory prongs. When all existing circumstances are examined under the seven statutory prongs of Section 3061, it is clear that FCA US met its burden of establishing good cause for termination:

1. FCA US established that DDI failed to capture the business available to it and DDI failed to prove otherwise. DDI's various, unsupported criticisms of FCA US's MSR is contradicted by the evidence presented by FCA US at the Hearing. Notably, DDI does not address why its operators have always accepted the MSR requirements set for them and have never sought to have these requirements adjusted, as was their clear contractual right. Moreover, DDI does nothing to explain how its sparse sales of new motor vehicles and wholesale parts, and poor service operations allow it to capture the business available to it. By contrast, FCA US presented clear, unequivocal evidence showing that DDI's sales have consistently placed it near the bottom of all the dealerships in California for nearly a half decade.

2. FCA US established that DDI failed to make sufficient investment in its business. DDI makes no effort to explain why it chose to make only minimal improvements to its dealership in the last year. DDI also does not address the fact that many of its renovations were made in response to several Americans with Disabilities Act ("ADA") lawsuits filed against DDI for non-compliance with the law. DDI does not address the fact that it did not upgrade its signage until <u>after</u> its Notice of Default period had expired as no more than a last ditch effort to create positive evidence for use at the Hearing. While DDI's Opening Brief presents a short list of the advertising expenditures the dealership has made, it does not adequately address the evidence showing that these expenditures pale in comparison to those of its competitors.

3. FCA US established that DDI failed to make permanent investments in the dealership. DDI argues that the real estate on which the dealership sits should be considered a

permanent investment. Yet the real estate is owned by the Sternfelds as a personal investment that is legally separate from the dealership and cannot be accounted for as an investment of the dealership. Moreover, DDI does nothing to address the evidence presented by both Walter and Frith showing that the dealership holds very few permanent investments.[3]

4. FCA US established that termination of DDI would benefit the public interest. Notably, DDI fails to address the pump-in reports presented by FCA US, showing that most FCA US customers in DDI's Trade Zone would rather drive miles away from home to purchase FCA US products than conduct business with DDI. DDI argues that its presence on Business Link and its wholesale parts business are unique aspects of DDI's dealership, yet fails to explain why these same services could not be provided by almost any other FCA US dealer, including the dealer that would replace DDI. Most importantly, DDI fails to offer any evidence in support of its contention that FCA US does not intend to find an immediate replacement dealer for DDI. DDI's contention is based on speculation and conjecture, and contradicts the overwhelming evidence presented at the Hearing that FCA US would immediately replace DDI with a far more capable dealer.

5. FCA US established that DDI does not to satisfy consumer demand. On this point, DDI merely repeats its argument that MSR is an inadequate metric, yet fails to acknowledge the numerous other pieces of evidence showing that DDI's customers are going elsewhere for FCA US products and services. DDI does nothing to explain why it has had so many poor customer service reviews placing it near the bottom of its class.

6. FCA US presented sufficient evidence to establish that DDI was not complying with its warranty obligation. DDI, in turn, failed to show that it fulfills its warranty obligations and does not address the evidence offered by FCA US.

7. FCA US established that DDI breached nearly all of its contractual obligations under the Dealer Agreement. Indeed, DDI did not address any of the core provisions of the Dealer Agreement upon which its business relationship with FCA US is governed. Instead, DDI skips over these provisions, incorrectly characterizing this termination as a "one issue case" in a failed attempt

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[3] DDI includes only one sentence in its Opening Brief that purports to address Walter's analysis.

to excuse the complete lack of credible evidence DDI was able to present to the Board on this or any other good cause factor.

II. ARGUMENT

A. FCA Proved That DDI Does Not Capture the Business Available to It

FCA US proved at the Hearing, as detailed in its Opening Brief, that DDI is unable and unwilling to capture the business available to it, and that this good cause factor alone is sufficient to warrant the termination of DDI's franchises. By contrast, in DDI's Opening Brief, DDI does not directly address its own dismal sales figures. Instead, DDI indirectly attacks FCA US's MSR metric, and alternatively argues that its sales are satisfactory if one were to assume that wholesale parts sales and service constitute the type of "business" referred to in Cal. Veh. Code Section 3061(a). As explained below, DDI's arguments are incorrect and unsupported by the evidence submitted at the Hearing.

1. <u>DDI's discovery arguments are disingenuous and misleading.</u>

DDI attempts to distract the Board from its poor sales by arguing that FCA US deprived DDI of a fair hearing by not producing a privileged market study. DDI's argument is disingenuous and misrepresents the underlying proceedings. DDI claims that FCA US was ordered to produce the privileged and confidential market study (the "Market Study," Ex. P189)[4] in a January 5, 2016 discovery order. The January 5th order says no such thing. (*See* Pre-Hearing Conference Order, Jan. 5, 2016.) FCA US consistently and routinely put DDI on notice that FCA US would not produce

[4] In FCA US's Opening Brief, numerous other filings, and at the Hearing, FCA US maintained its objection to DDI's use of the Market Study as that document is protected under the attorney-client privilege. FCA US hereby reasserts that objection and does not waive this privilege. "The attorney-client privilege applies to a confidential communication between the attorney and client . . . ." *Costco Wholesale Corp. v. Superior Ct.* (2014) 47 Cal.4th 725, 732 (citing Evid. Code, § 954 (providing that the holder of the attorney-client privilege "has a privilege to refuse to disclose, and to prevent another from disclosing, a confidential communication between client and lawyer . . . .")). Moreover, "[t]he attorney client privilege . . . bars discovery of the communication irrespective of whether it includes unprivileged material." *Id.* at 734; *Mitchell v. Superior Ct.* (1984) 37 Cal.3d 591, 600. Because Bashar Cholagh, an employee of FCA US, was directed to create the Market Study by in-house legal counsel, and presented the Market Study to in-house legal counsel, the Market Study is protected by the attorney-client privilege and FCA US had a good faith basis to withhold its production.

privileged and confidential documents of this nature. On January 22, 2016, FCA US sent responses and objections to DDI's initial discovery requests, stating that FCA US would not produce any market studies to the extent they were protected by the attorney-client privilege or work product doctrine. (Resp't Resp. & Objections to Protestant's Req. for the Produc. of Docs. & Things, Jan. 22, 2016, at 17:14-18:7.) Later, when Mr. Cholagh was deposed on July 14, 2016, he testified that he had been asked by FCA US internal legal counsel to prepare the Market Study of the San Fernando Sales Locality and asserted the attorney-client privilege at that time. This same dialogue occurred in the depositions of other FCA US employees.

Yet months later, DDI's counsel feigned surprise at the Hearing when Cholagh reiterated the exact same testimony he had given at his deposition: that a market study had been prepared of the San Fernando Sales Locality at the behest of in-house legal counsel. (R.T. Vol. V, 138:23-139:5 (Cholagh).) Although DDI became aware that FCA US had withheld the Market Study under the attorney-client privilege many weeks before the Hearing commenced, DDI did not move to compel the production of the Market Study until August 17, 2016—after the Hearing had already started.[5] After the motion to compel was filed, counsel for FCA US offered multiple opportunities to confer with counsel for DDI while the Hearing was progressing, but these efforts by FCA US were largely ignored until the Hearing was nearly over.

On September 13, 2016, ALJ Pipkin ordered that the Market Study be produced, and FCA promptly complied, after properly preserving its objections to the production. DDI's attempt to mischaracterize this series of events is disingenuous and ignores the fact that the late efforts of DDI's own legal counsel dictated the timing of the Market Study's production.

Not only does DDI mischaracterize the procedural history by which the Market Study was produced, but DDI also misrepresents the contents of the Market Study. DDI claims that the Market Study contradicts the testimony given by FCA US's representatives and expert witnesses. As explained in detail below, the contradictions that DDI claims are illusory, and the testimony provided by each and every witness called by FCA US was consistent and did not deviate from the

[5] In making this argument, DDI also ignores the fact that its document production was actually deficient, requiring DDI to produce additional documents after the Hearing had started.

findings presented in the Market Study. Among other things, the Market Study found that DDI was severely underperforming and that its MSR achievement had plummeted in the past five years. (Ex. P189 at FCA_025801.) The Market Study also found that, despite DDI's upgrades to its façade, DDI remained out of compliance with FCA US image standards as to both the interior and exterior of its dealership. (*Id.*) These points and more were corroborated by the testimony of each and every FCA US representative and by the expert reports and testimony of Frith and Walter. DDI was given a more than fair opportunity to develop all of these factual topics without resort to or reliance on a privileged, internal document, requested by in-house counsel at or the near the time this litigation commenced. DDI has now cited to the Market Study and relied on the Market Study for many, if not most, of its arguments in its Opening Brief, making this privileged document inextricably intertwined with its arguments. Yet, in the end, this document does nothing to change the fact that DDI's sales in the last half a decade were among the worst in the State of California.

2. <u>DDI does not transact business commensurate with what is available to it</u>

Without citation to any case law or other supporting authority, DDI contends that the "business" referred to in Section 3061(a) would include DDI's wholesale parts operation. This is incorrect. As explained in FCA US's Opening Brief, the critical component of DDI's contractual obligations under the Dealer Agreement, as with Section 3061(a), is the sale of new motor vehicles. (FCA US's Opening Brief, §IV.A.5.iii.) DDI's parts sales performance is inconsequential to the Board's analysis on the issue of the amount of business transacted by DDI compared to the business available to it.DDI's focus on its parts sales is merely an ineffective attempt to gloss over the clear, objective evidence showing that DDI sells fewer new motor vehicles than almost any other FCA US dealership in California.

Moreover, DDI does not explain or point to any evidence presented at the Hearing to show that its wholesale parts business is significantly more robust than any other FCA US dealer. Nor does DDI address why this business could not just as easily be replicated or absorbed by any other FCA US dealer. (FCA US Opening Brief § IV.C, 70:19-71:11.)

DDI cites to Stockton's testimony at the hearing that DDI's sales would amount to an ambiguous 87.6%. The testimony of Stockton is unclear and unsupported, and it remains a mystery *what* exactly this would be a percentage *of.* (DDI Opening Brief at 6:6-17.) Stockton gave no explanation for how he derived this number, or what it even means with relation to DDI's parts sales. Indeed, this 87.6% figure is supposedly a combined number totaling DDI's parts, new vehicle sales, body and paint, and service operations; though Stockton gave no explanation of how each business segment was weighted in this analysis. (Ex. P181, Tab 19, pg.1.) Nor does Stockton explain why used vehicle sales were excluded. (R.T. Vol. XII, 66:13-19 (Stockton).) Stockton's testimony regarding DDI's parts sales lacks explanation or factual support and, therefore, should be givenlittle weight.

Though DDI ignores it in its Opening Brief, FCA US's economic expert, Walter, examined DDI's parts business and showed that DDI was focusing its energies and investments on parts to the exclusion of its new motor vehicle sales. (R.T. Vol. IX, 48:25-50:16 (Walter) (describing DDI's parts sales, as compared to DDI's new vehicle sales, as a "very unusual situation.") As observed by Walter, this practice it is highly problematic considering DDI's statutory requirement to capture the business available to it, and its contractual obligation to sell a sufficient number of vehicles to satisfy its MSR requirements. (*Id.*at 26:18-27:6.) While DDI has made the business decision to develop its parts business, it has also made the corresponding decision to neglect its new vehicle sales and is therefore unable to capture the business available to it.

3. <u>DDI's criticisms of MSR are invalid and are contradicted by the evidence presented at the Hearing</u>

DDI's Opening Brief does not directly address the raw sales figures presented at the Hearing which shows DDI to be one of the lowest performing dealers in the State of California for the past five years. Instead, DDI devotes the majority of its brief to attacking the metric on which DDI and all other FCA US dealers are evaluated—MSR.

Of course, DDI's operators admitted that they never contested the way their sales requirements were calculated prior to this termination proceeding, nor have they ever sought to have their sales requirements adjusted even though they had a contractual right to make such a request. (R.T. Vol. XIV, 176:12-22 (E. Sternfeld); R.T. Vol. XIII, 105:16-106:2 (J. Sternfeld); *see also* R.T. Vol. III, 48:3-6 (Tangeman); R.T. Vol. VIII, 52:8-12 (Chandler).) This is unsurprising since, as explained in FCA US's Opening Brief, MSR provides an accurate and conservative measure of a dealer's expected and actual sales performance, and accounts for numerous unique characteristics and variables faced by each FCA US dealer. (*See* FCA US Opening Brief, §§ IV.A.1-3.) As explained below, all of DDI's criticisms of MSR evidence DDI's misunderstanding and mischaracterization of how MSR is calculated.

Although DDI did not raise this issue at the Hearing or at any other point prior to filing its Opening Brief, DDI for the first time argues that the MSR formulation does not comply with Cal. Veh. Code Section 11713.13(g)(2), and goes on to list several criticisms in support of that contention. This termination proceeding was commenced to resolve whether good cause exists under Section 3061 to warrant the termination of DDI's franchise. It was not commenced to determine whether MSR satisfies Section 11713.13(g), and the Board need not even address this statute in order to conclude that FCA US has shown ample good cause in favor of DDI's termination. The various components that comprise the MSR calculation were engineered to satisfy each and every one of the factors enumerated in Section 11713.13(g), and FCA US's MSR does satisfy this statute. DDI's criticisms to the contrary are not supported by evidence and they have no relationship to the factors listed in Section 11713.13(g).

Moreover, Section 11713.13(g) would not directly apply in the present context. Here, DDI's termination is not based exclusively on MSR. Rather, DDI's termination is based on the good cause factors listed in Section 3061, which cover nearly every aspect of a dealership's business, and the evidence presented at the Hearing in support of those good cause factors. To say that the Board would affirm DDI's termination based on its inability to achieve MSR alone would ignore the plain language of Section 3061 and the vast majority of the evidence presented at the Hearing.

a. MSR does account for brand preference

DDI argues that because consumers in the San Fernando Sales Locality tend to purchase more Toyota and Honda products than FCA US products, DDI should not be expected to meet its contractual MSR obligation. (DDI Opening Brief at 8:6-10:14.) DDI neglects to acknowledge that Toyota sells less than expected in the San Fernando Sales Locality, based on its comparative sales across the state. (R.T. Vol. X, 19:14-19 (Frith).) Indeed, DDI did not put on any evidence showing that Toyota, Honda, or any other "import" brand performs any better or worse in the San Fernando Sales Locality than these brands perform in other parts of California. Moreover, as explained in FCA US's Opening Brief, MSR incorporates several variables that directly account for local market variations, but which are not even addressed in DDI's Opening Brief. (FCA US Opening Brief § IV.A.1.) Specifically, with respect to each vehicle in each segment, such as the compact segment, DDI is only apportioned a number of sales commensurate with that vehicle's performance across the state, and within that segment. (*See id.* at 27:8-24.) This number is further adjusted by DDI's fair share, which accounts for the unique characteristics of DDI's Trade Zone, not to mention the local registrations of each segment. (*Id.* at 25:4-24, 27:8-28:10.) Though DDI never requested to have a slant applied to its MSR requirements, MSR does contemplate the application of this device to further reflect any local market variations. (*Id.* at 25:25-26:7.) DDI does not address any of these mechanisms employed by MSR, which fully account for any unique characteristics, including local consumer preferences and registrations, that might be present in DDI's sales territory.

DDI cites to a map contained in a report prepared by John Tangeman, an FCA US employee, in an attempt to show that FCA US sales in Los Angeles tend to perform below the California average. (Ex. P144 at FCA_002380.) First, this map does not measure MSR, but rather compares various California localities against the performance of FCA US brands across the nation. (*Id.*) Second, both Tangeman and Cholagh testified that the results of this map are not due to some intangible customer preference for "imports." Rather, both explained that FCA US had been underrepresented in those exact areas at the time the data underlying that map was collected. (R.T. Vol. IV, 73:1-74:16 (Tangeman) ("I've seen poor registration effectiveness when we have open points, where we don't have dealers in markets. And that's what, in my mind, this map is reflecting.")); (R.T. Vol. V, 176:22-178:4 (Cholagh) ("[W]e have some open points in Los Angeles where we need additional representation . . . . And we have areas in the market where we outperform state and other areas where we're underperforming versus states. And once we get the open points filled that generates more sales and cross-sale, and hopefully, we'll bring our share up."))

DDI also relies on tab four of Stockton's report, yet does not cite to any of Stockton's testimony explaining these calculations. Notably, the representations contained in Stockton's report are not a measure of MSR, or even a component of MSR, but only the registration effectiveness of FCA US as a whole. Frith analyzed tab four of Stockton's report and explained that it "clearly misrepresents what's going on in LA County." (R.T. Vol. X, 211:2-12 (Frith).) Frith explained that the graphics in Stockton's tab four are presented such that "you're trying to represent, I believe, that LA County can't achieve [the California sales average], therefore [MSR is] a bad standard." (*Id.*) However, "we know that 40 percent or so of the trade zones in the [Los Angeles] area do achieve [MSR], for example, Rydell. So to make a conclusion, I think, is wrong." (*Id.*) Moreover, though DDI fails to address it, the performance of Los Angeles as a whole is impacted by the fact that LA County has an unusually large amount of underperforming dealers, including DDI, that hinder FCA US's registration effectiveness in that region. (R.T. Vol. X, 212:6-12 (Frith).) LA County also contains many "open points" that have a negative impact on FCA US's registration effectiveness, but that actually help DDI's ability to achieve its sales objectives because it allows DDI to capture those sales and get credit for them against its MSR. (*Id.*)

DDI is critical of Frith's assertion that import bias is, in reality, more likely a consumer decision to buy one car over another based on the features offered. (DDI Opening Brief at 9:10-10:4.) Yet DDI misses the point – it expends much effort arguing that import bias is a reality, but does not address, or even acknowledge, the mechanisms that MSR employs to directly account for local differences in FCA US's brand popularity. MSR only assigns dealer responsibility based on the actual market share captured by any given vehicle, and only within the vehicle segment in which that vehicle competes. (*See* FCA US Opening Brief §IV.A.1.) At the more local level, MSR adjusts the dealer's responsibility using fair share. (*Id.*) MSR even provides for adjustments at the individual dealer level with the application of slants. (*Id.*) DDI spends much of its brief attempting to prove that there is such a thing as import bias, yet the existence of this phenomenon has nothing to do with the present controversy. And in any event, the various tools embedded within the MSR calculation are sufficient to account for this type of brand preference. DDI's arguments to the contrary are unavailing, and it has not presented any evidence showing that the sales objectives applied to DDI are unreasonable.[6]

b. MSR directly accounts for the market characteristics of Canoga Park through its Fair Share calculation

DDI argues that MSR fails to account for any unique characteristics of DDI's sales territory, Canoga Park. (DDI Opening Brief at 10:15-12:2.) As FCA US predicted in its Opening Brief, this argument is essentially DDI's admission that its operators have made the business decision to reside in an economically depressed area, and that DDI should be held to a lower standard because of this business decision. (FCA US Opening Brief §IV.A.5.ii.) DDI's disparaging remarks about its own location are unavailing. As explained in FCA US's Opening Brief, DDI should not be excused for its poor performance due to its operators' poor business decisions. (*Id.*) Indeed, DDI agreed to relocate in 2007 but never lived up to this commitment. (*Id.*) And in any event, the evidence presented at the Hearing shows that DDI's sales territory is sufficient to support DDI's sales objective, if its operators possessed the business acumen to capitalize on that potential. (*Id.*)

DDI argues that its MSR requirement would not change if it were to move to a more productive area in Woodland Hills, thus proving that MSR is an inadequate performance metric. DDI's argument is incorrect. Indeed, DDI does not address the fair share component of the MSR calculation on this point, indicating that it likely does not understand that this metric is directly, and exclusively, determined by the unique characteristics of DDI's own trade zone and its performance within that trade zone. If DDI were to move to a more optimal location, its vehicle sales might go up from their present level. As explained in FCA US's Opening Brief, the fair share assigned to DDI is

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[6]DDI asserts that the Board should follow the holding in *Beck Chevrolet Co., Inc. v. General Motors LLC*, 53 N.E.3d 706 (N.Y. Ct. App., May 3, 2016). However, there is no factual predicate to compare General Motors' performance measurement with FCA US's MSR formula, and the New York law applied in *Beck* does not follow California law. Specifically, General Motors' performance measure, as explained by the court in *Beck*, does not include a fair share adjustment, nor does it include the application of slants. *See id.* at 709-11. Nor does the other, non-party's dealer agreement have an express provision in its dealer agreement allowing for a dealer to make a written request for an adjustment, which DDI admits here it never requested. Moreover, the *Beck* decision did not involve a termination proceeding, but rather was an action commenced under a discrete provision of New York, not California law. *Id.* at 711. This New York law, in turn, does not govern termination proceedings and is not related to the good cause factors in Section 3061. *See id.*; N.Y. Veh. & Traffic Law §463(2)(gg). The performance standard at issue in *Beck* is inapplicable to the present case, as was the law applied.

based on DDI's actual sales relative to the registrations of other brands within the trade zone. (FCA US Opening Brief §IV.A.1, 25:4-24.) Thus, if DDI were to relocate to a more optimal location, and sell more vehicles, its fair share may rise, thus increasing its MSR objectives. Yet DDI does not address the fair share calculation.

In an effort to prove that Canoga Park is as bad as DDI claims it to be, DDI cites to Stockton's testimony for the proposition that DDI pays its salespeople more than other FCA US dealers. First, Stockton's testimony provides no explanation of how he derived this comparison. Indeed, Stockton purports to compare DDI's financial data to a "composite" group of FCA US dealers, yet Stockton admitted that he does not know what dealers are contained in this composite. (R.T. Vol. XII, 198:9-15 (Stockton).) Moreover, Stockton's report only looks to the compensation paid out to sales managers, not DDI's salespeople. By contrast, Walter examined the salaries paid out to actual salespeople and found that DDI severely underpaid these employees relative to other FCA US dealers. (R.T. Vol. IX, 45:22-46:4 (Walter); Ex. R423A at 030; *see also* FCA US Opening Brief §IV.A.4.iii, 47:18-48:9.) Stockton's analysis also completely ignores that DDI pays its managers more per dollar of new vehicles Gross Profit in part because DDI's sales volume is so much lower than that of other dealerships. DDI also contends that the other FCA US dealer in Canoga Park, West Valley, has a "similar MSR pattern to" DDI, yet nothing could be further from the truth. As soon as West Valley opened in November, 2015 under new, more aggressive management, its MSR performance vastly improved. (R.T. Vol. X, 123:8-124:12 (Frith); Ex. R422A at 078; R.T. Vol. VII, 11:2-17 (Nouri); R.T. Vol. I, 174:21-24 (Weeks); *see also* FCA US Opening Brief §IV.A.5.ii, 59:10-60:11.)

FCA US clearly demonstrated that MSR adequately accounts for the characteristics of DDI's sales territory, and further that DDI's sales territory is capable of supporting the sales necessary to achieve DDI's MSR requirements. Because DDI's sales territory is capable of supporting the necessary sales, DDI never challenged its MSR or even asked to have it adjusted. DDI's arguments are without factual support and are contradicted by the clear evidence presented by FCA US at the Hearing.

c. MSR accounts for the local demographics and other market conditions in DDI's sales territory

DDI argues that MSR fails to account for market demographics or local market conditions in DDI's sales territory. (DDI Opening Brief at 12:3-13:3.) DDI is incorrect, as MSR accounts for market demographics through the data it relies on—the DMV registrations of the actual individuals who purchase vehicles and register them in Canoga Park. (*See* FCA US Opening Brief §IV.A.1, 24:4-21; R.T. Vol. IX, 224:21-225:14 (Frith); Ex. R302 §11(a)) These people are of varying ethnicities, educational backgrounds, professional backgrounds, and income levels. For example, if everyone with incomes over $100,000 wanted to purchase Dodge Chargers one year, that would cause the sales, and resulting registrations, of Dodge Chargers to go up. That increase in registrations would increase the sales objective for Dodge Chargers, thereby directly impacting the MSR measurement for that vehicle. This is how MSR accounts for all the demographic characteristics of its actual customers, i.e., the actual individuals who register vehicles. The same is true if incomes drop in the area, resulting in registrations to decline, then so too does DDI's MSR objective. DDI does not address FCA US's use of actual registration data in calculating MSR, nor does it question the validity of that data. Moreover, as explained above and in FCA US's Opening Brief, MSR provides for further adjustment for local variations through the application of fair share and slants. Yet DDI simply ignores these metrics and how it is applied to MSR.

DDI contends that "FCA made no attempt to explain why [DDI] is more effective for Ram sales than Dodge." (DDI Opening Brief at 12:11-12.) DDI offers a so-called "regression analysis" performed by Stockton in support of this point, yet cites to only seven lines of Stockton's testimony that do nothing to explain that analysis. However, Frith explained thatStockton's analysis was significantly flawed and overly simplistic. (R.T. Vol. X, 163:24-164:16 (Frith).) Moreover, though DDI does not address Walter's testimony or report, Walter demonstrated that DDI experiences different sales results for its two franchises because it employs different sales strategies for the different brands. (*See* FCA US Opening Brief §IV.A.3, 36:19-37:12 (citing Walter testimony and report).) DDI's argument ignores this evidence, and it is disingenuous for DDI to contend that the MSR calculation creates varying results that were, in reality, results of DDI's own making.

The method by which MSR is calculated incorporates several mechanisms to account for the unique characteristics of DDI's sales territory. The reason that DDI has chronically underperformed is not because MSR is a flawed performance measure, but because DDI's operators employed flawed business practices.

d. MSR is not required to measure sales opportunity outside of DDI's Trade Zone, though it does give DDI credit for those sales

Confusingly, DDI argues that MSR is flawed because it does not assign DDI any sales responsibility for the territory outside of its Trade Zone, and DDI relies on Section 11713.13(g) for this proposition. (DDI Opening Brief at 13:4-23.) This contention is clearly misleading, and misstates the plain language of Section 11713.13(g). That provision indicates that a "program for measuring dealership sales" is reasonable where it accounts for characteristics "in the dealer's area of responsibility." *See* Section 11713.13(g)(1)(A)(i), 11713.13(g)(1)(A)(ii), 11713.13(g)(1)(A)(v). DDI's contention that MSR should account for extra-territorial sales opportunity would therefore require MSR to look at <u>the exact opposite</u> data cited in Section 11713.13(g). DDI's argument directly contradicts the statute to which it cites and should be disregarded.

Moreover, DDI's attack on MSR in this regard is factually incorrect, as MSR does account for sales outside of DDI's trade zone. Sales outside the trade zone are counted towards DDI's MSR <u>achievement</u>, but do not count towards DDI's MSR <u>objective</u>. (R.T. Vol. V, 24:16-21 (Cholagh); R.T. Vol. III, 54:7-13 (Tangeman); *see also* FCA US Opening Brief §IV.A.1, 27:25-28:10.) If extra-territorial opportunities were counted towards DDI's sales objective, DDI's MSR objective would raise by an immeasurable amount, as DDI would have the theoretical opportunity to sell its cars to anyone in the world. The fact that FCA does not consider DDI's opportunities to sell cars outside of its trade zone is only a benefit to DDI, not a hindrance, because FCA does allow extra-territorial sales to contribute towards DDI's achievement of those purely local objectives.

e. DDI's significant failure to meet its sales objectives for over a half decade is clearly a "material" breach of its contractual obligations, and a "material" inability to achieve sales commensurate with what is available in the market

DDI appears to argue that because it is not presently the very worst dealer in California, its franchises should not be terminated. (DDI Opening Brief at 14:1-15:4.) Yet the good cause factors enumerated in Section 3061 contain no requirement that a dealership be the absolute worst to justify termination. Indeed, the fact that DDI applauds itself because it is not currently in last place corresponds with the Sternfelds' refusal to make changes in their business despite the dealership's anemic performance for the past half-decade. (*See* FCA US Opening Brief §IV.A.2.) FCA US pursued termination against DDI because of the dealership's overall operational failures that, when viewed as a whole, do make DDI the worst performing dealership in California.

Though it does not explain how it would impact the Board's analysis, DDI also argues that MSR is an inadequate performance metric because it does not have a black and white "materiality" standard that could be used to justify termination regardless of any other circumstances. DDI essentially contends that MSR should be structured such that all dealers achieving below 100% MSR should be terminated, and all dealers at or above 100% MSR should not be terminated. Yet DDI's assertion oversimplifies this Board's analysis, and further attempts to oversimplify MSR in a way that would render it far less useful.

DDI's own circumstances present a good example of why a bright-line termination standard would be unreasonable. In 2011, DDI significantly underperformed from its contractual MSR requirements. (*See* FCA US Opening Brief §II.C.) Yet instead of immediately commencing termination proceedings, FCA US began actively reaching out to the dealership, counseling the Sternfelds on potential operational improvements that would allow them to achieve their contractual MSR obligations. (*Id.*) DDI continued to deviate significantly from MSR, and again fell far below its requirements in 2012. (*Id.*) Nevertheless, FCA US maintained constant contact with the dealership, offering support and guidance. (*Id.*) DDI fared no better in 2013 or 2014, experiencing sales results that put it near the bottom of all FCA US dealerships in the State of California. (*Id.* §II.D.) Yet FCA US remained in constant contact and offered the Sternfelds the tools and guidance that would have allowed them to improve. (*Id.*) By 2015, it became clear that DDI had no intention of attempting to improve its condition. (*Id.* §II.E.) Thus, after significant deliberation and as a "last resort," FCA US made the decision in late 2015 to terminate DDI's Dodge and RAM franchises. (*Id.*) Had FCA US employed DDI's MSR deficiencies as a bright-line termination standard, FCA US should have pursued termination back in 2011 at the point that DDI first exhibited these deficiencies. However, because FCA US employed a process of both counseling the dealership and evaluating its improvement over time (or lack thereof), DDI was thereby given five years to implement strategies to improve its performance and stave off termination. Unfortunately, DDI's operators chose to take no action, and this termination became inevitable.

In any event, the question of what level of underperformance is so egregious as to constitute "material" underperformance justifying termination is not a difficult one here, as there can be no denying that DDI's extraordinary underperformance for the past half-decade can lead to no other conclusion but that termination is warranted pursuant to Section 3061. *Ford Motor Co. v. New Motor Vehicle Bd.* (Jan. 29, 1997) Cal. Super. Ct., No 96CS0247, at 5 ("nothing in [section 3061] prohibits a finding that, in any given set of facts, one factor may be so egregious that it would outweigh any remaining factors as to which proof was adduced.") As explained in detail in FCA US's Opening Brief, DDI's MSR performance for the past half-decade has been consistently far below its contractual requirements. (FCA US Opening Brief § IV.A.2.) Indeed, when DDI was placed under a Notice of Default, its performance worsened. (*Id.* § II.E.) Of course, there are numerous reasons that FCA US has chosen to pursue this termination and, as explained in FCA US's Opening Brief, each and every one of the Section 3061 good cause factors weigh in favor of termination. Yet the magnitude of DDI's MSR deficiencies, combined with the longevity of those deficiencies, very clearly shows a "material" inability to capture the business available to DDI and, without more, would provide good cause for termination.

DDI does not explain why MSR must define a clear number when termination would be warranted and when it would not be. Nor does Section 3061 require a black and white "materiality" threshold. This is merely an academic question since, in this case, it is clear that DDI has been one of the very worst dealers in California for the past half-decade.

f. Regardless of whether DDI's sales obligations account for luxury brands, DDI's sales remain some of the worst in California

DDI argues that its MSR requirements are unfair because DDI assumes that it competes with "luxury" vehicle brands. (DDI Opening Brief at 15:5-16:3.) For two reasons, DDI is incorrect. (FCA US Opening Brief § IV.A.3, 35:16-36:2.) First, Frith analyzed DDI's performance without the consideration of luxury brands and found that there was no significant improvement. Specifically, Frith measured DDI's sales results from 2011 to 2015 and applied those results against FCA US's recently updated segmentation, which re-segments certain vehicles that would be considered "luxury" vehicles. (Ex. R422D at 334.) After applying the new segmentation scheme to DDI's past sales results, Frith's report demonstrates that "there's really no change based on the segmentation change in the performance metric" for DDI, with or without "luxury" brands." (R.T. Vol. X, 22:9-23:15 (Frith); Ex. R422D at 334.) Second, after FCA US revised its segmentation in 2016 to segregate purported "luxury" vehicles, DDI's sales and MSR performance declined even further. (*Compare* Ex. R325 (DDI's 2016 MSR achievement); *with* Ex. R326 (DDI's 2015 MSR achievement).)

DDI asserts that the market share for luxury brands is higher in DDI's trade zone than in other parts of California, relying on the privileged and confidential Market Study that FCA US was compelled to produce during the course of the Hearing. Yet the page of the Market Study that DDI cites for this proposition does not discuss luxury brands. (DDI Opening Brief at 15:21-22.) Indeed, the Market Study does not discuss or in any way address the influence of luxury brands in the San Fernando Sales Locality relative to other parts of California. (*See generally*, Ex. 189.) However, the Market Study does demonstrate that, even if DDI's MSR were completely recalculated using FCA US's new segmentations, DDI would still be severely below its MSR requirements. (*Id.* at FCA_025788 (chart titled "Luxury Impact on MSR").)

DDI also contends that its MSR achievement for RAM would have been slightly closer to 100% in 2015 if it had had the benefit of FCA US's revised segmentation. However, as explained above, any change to DDI's MSR performance would be insignificant. Moreover, DDI fails to acknowledge that its MSR performance for its RAM franchise was significantly below requirements in all prior years, (Ex. R327 at 012 (December, 2014 RAM MSR at 80.66%); Ex. R328 at 012 (December, 2013 RAM MSR at 77.08%); Ex. R329 at 012 (December, 2012 RAM MSR at 79.44%)), and continued to be significantly below requirements in subsequent periods. (Ex. 325 (RAM MSR at 50%, 57.14%, and 67.86%, respectively, for the first three months of 2016); *see also* FCA US Opening Brief §IV.A.3, 36:3-18.)

DDI did not present any credible evidence showing that the inclusion or exclusion of "luxury" brands has any impact on its sales performance. As the foregoing evidence shows, regardless of whether DDI's sales are measured against luxury brands or not, DDI remains one of the worst dealers in the State of California.

g. DDI's argument regarding alternative fuel vehicles is a red herring

DDI argues that it is unfair that it should be forced to compete against alternative fuel vehicles, including hybrid and electric vehicles. (DDI Opening Brief at 16:4-17.) As DDI acknowledges, Frith analyzed the presence of alternative fuel vehicles in DDI's Trade Zone and concluded that it did not have a statistically significant impact on DDI's MSR performance. (R.T. Vol. X, 23:16-25:3 (Frith); Ex. 422D at 335-336; *see also* FCA US Opening Brief § IV.A.3, 35:6-15.) DDI cites to the Market Study in support of this point, yet the Market Study does not contain any analysis that would show a discernable impact to DDI's MSR performance caused by the presence of alternative fuel vehicles. (Ex. 189 at FCA_025789.) To the contrary, the Market Study shows that alternative fuel vehicle sales in DDI's Sales Locality are almost identical to the rest of California. (*Id.* (chart titled "Alternative Fuels As a percent of Total").) DDI has not presented any credible evidence to show that the inclusion or exclusion of alternative fuel vehicles would have any impact on DDI's MSR achievement.

h. MSR does not compare DDI's Dodge and RAM franchises against Chrysler and Jeep franchises

DDI argues that it is unfair that it is forced to compete with other FCA US dealers that have four franchises—Chrysler, Jeep, Dodge, and RAM—while DDI only has Dodge and RAM franchises. As an initial matter, DDI should not be permitted to complain of its status as a stand-alone dealership when this was a business decision within the control of DDI's operators. (*See* FCA US Opening Brief §IV.A.5.i.) As explained in FCA US's Opening Brief, the onus is on DDI's operators, not FCA US, to acquire Chrysler and Jeep franchises,if they so desire. (*Id.*) Indeed, when presented with the opportunity to purchase the Chrysler and Jeep lines, the Sternfelds declined the offer. (*Id.*)

In any event, the evidence presented at the Hearing shows that if DDI were a dealership with all four brands, it would not necessarily perform any better than a stand-alone dealership.[7] Specifically, as numerous FCA US witnesses testified, DDI would not be able to improve its sales merely by obtaining additional franchises; it would also have to make significant additional investments. (*See* Ex. J-4_0138:5-13 (Corle Dep.) ("If a dealer doesn't change his business practices, adding the additional line will not increase sales.") As DDI's past behavior clearly demonstrates, its operators would be unlikely to make the significant additional investments or other changes that would be necessary to support these additional responsibilities. Indeed, as Nouri testified, the Chrysler brand would not necessarily assist DDI to improve its overall MSR performance. (R.T. Vol. VII, 48:12-24 (Nouri) ("Chrysler is almost nonexistent. To put it in perspective, my [West Valley] location will sell 235 cars. I will probably end up selling ten Chryslers, brand new ones.")) DDI's argument neglects to account for these additional burdens that are attendant to the ownership of additional franchises. (*See also* FCA US Opening Brief at 56:3-57:10.)

Moreover, DDI does not address the evidence presented at the Hearing showing that less-than-full line dealerships are fully capable of achieving MSR when placed in the control of strong operators. For example, when West Valley opened in November, 2015 under new, more aggressive ownership, its sales immediately spiked over the MSR achievement of its prior owner. (R.T. Vol. X, 123:8-124:12 (Frith); Ex. R422A at 078; R.T. Vol. VII, 11:2-17 (Nouri); R.T. Vol. I, 174:21-24 (Weeks); *see also* FCA US Opening Brief § IV.A.5.ii, 59:10-60:11.) Likewise, Nevers, the current head of the California Business Center, testified to his preference in certain circumstances to keep stand-alone dealerships and cited numerous examples of other FCA US dealers throughout the country where the affirmative decision was made to avoid consolidation. (R.T. Vol. VIII, 169:8-170:13 (Nevers).) Indeed, Chandler testified of FCA US's new practice of opening new, stand-alone

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[7] DDI's argument is also inconsistent with the arguments it makes elsewhere. For example, at times, DDI suggests a Ram and Dodge dealership cannot compete against a full line dealership. DDI also contends moving to Woodland Hills is not possible without all four lines. Then, in direct contradiction to that position, DDI argues it's Ram and Dodge franchises must be evaluated separately because, in its opinion, its Ram business performs better than Dodge. DDI's suggestion that its Dodge franchise should be terminated, but not its Ram franchise is nonsensical. As discussed below, DDI is not the type of strong operator that would be able to excel or survive operating a stand-alone Ram dealership.

Jeep dealerships. (R.T. Vol. VIII, 64:21-65:18 (Chandler).)

DDI has not presented competent evidence showing that FCA US dealerships with four franchises perform materially better than stand-alone dealerships such as DDI. Instead, as explained above and in FCA US's Opening Brief, DDI's underperformance is caused solely by its operators' own business decisions.

i. DDI's Trade Zone is accurately measured

Without any citation to evidence, authority, or even explanation, DDI complains that "MSR fails to account for the variance based on how the Trade Zone is defined." (DDI Opening Brief at 17:23-18:3.) However, DDI's argument misconstrues the method by which MSR is calculated. Indeed, the Trade Zone determination is not merely an outside influence that impacts MSR, but rather is a major part of the MSR methodology that acts as a significant factor in the holistic assessment of a dealer's sales opportunity. (*See* FCA US Opening Brief § IV.A.1, 22:18-24:3.) Frith performed a multi-point, statistical analysis of DDI's Woodland Hills Trade Zone, and found that DDI's Trade Zone assignment was "not the cause of the poor [DDI] performance." (Ex. 422A at 006, ¶14, 042-045 (demonstrating that other methods of drawing DDI's Trade Zone would produce the same results); R.T. Vol. X, 61:19-65:16 (Frith); *see also* FCA US Opening Brief §IV.A.4, 38:4-19.) DDI's operators also admitted that they had never spoken with anyone at FCA US to request a change to DDI's Trade Zone definition. (R.T. Vol. XIV, 176:12-22 (E. Sternfeld).)

DDI seems to conflate the concepts of Fair Share and Trade Zone assignment, demonstrating its misunderstanding of how each is calculated. As explained in FCA US's Opening Brief, Fair Share does not vary based on "timing and the assumptions made." (DDI Opening Brief at 18:1.) Instead, DDI's Fair Share is calculated based on DDI's actual sales of vehicles, versus the actual vehicles registered in each segment by other brands within the Trade Zone. (FCA US Opening Brief §IV.A.1, 24:22-25:24.) DDI mischaracterizes and misconstrues the building blocks of MSR, and its criticisms of these metrics should be disregarded.

j. DDI faces competition, just like other dealers

DDI complains that its MSR requirements should be lowered because it competes with other, nearby FCA US dealers. (DDI Opening Brief at 18:4-17.) However, this characteristic is not "unique," as DDI contends, but is a common aspect of most FCA US dealerships. (Ex. R422A at 007, ¶16, 047 (demonstrating that DDI faces only an average amount of competition and that other dealers facing similar competition far outperform DDI); R.T. Vol. X, 67:11-68:17 (Frith).) DDI also argues that its ability to achieve MSR deteriorated due to the re-establishment of two nearby FCA US dealers that had gone out of business a few years prior, one in Van Nuys and the other, named Rydell, located in San Fernando. However, as explained in FCA US's Opening Brief, DDI was notified by FCA US at the time these dealerships were established, and had a legal right under California law to protest these establishments. (FCA US Opening Brief §IV.A.5.ii, 60:11-61:15.) DDI did not protest these establishments, but rather accepted $50,000 as compensation for DDI's consent to the establishment of each dealership. (*Id.*; Exs. R315, 316.) DDI did nothing in the way of additional advertising or other investment in response to the re-establishment of these dealers. (R.T. Vol. XIII, 131:23-133:18 (J. Sternfeld) (acknowledging no operational changes were made in response to the re-establishment of Rydell or Van Nuys; R.T. Vol. XIV, 158:25-160:5 (E. Sternfeld) (same).) And in any event, these dealers are located in separate and distinct markets. (R.T. Vol. III, 148:5-15, 149:8-150:14 (Tangeman).) The separateness of these territories is confirmed by the fact that DDI's MSR achievement actually <u>improved</u> following the re-establishment of Rydell. (R.T. Vol. X, 59:2-9 (Frith).) Moreover, these same dealerships, in these same locations, were all open under different ownership prior to 2009—a time when DDI's more vigorous operations allowed it to meet its contractual obligations. (R.T. Vol. III, 148:16-17, 150:12-14 (Tangeman).)

DDI further contends that West Valley experienced a similar decline in sales performance following the re-establishment of Rydell and Van Nuys. This is incorrect. As stated previously, when West Valley changed ownership in late 2015, its sales improved dramatically. DDI has not presented any credible evidence showing that DDI faces competition that renders it unable to meet its contractual MSR obligations.

4. <u>DDI misrepresents the contents of the Market Study</u>

In its Opening Brief, DDI leans heavily on the Market Study in an attempt to turn the Board's attention away from the substantive merits of these proceedings – whether FCA US has demonstrated good cause to justify termination under the good cause factors of Section 3061. The

Market Study does not expressly speak to any of these factors and the arguments made by DDI in reliance on the Market Study are misplaced. DDI also misrepresents the contents of the Market Study. DDI contends that the Market Study shows that "FCA does not offer a viable competing vehicle in the compact segment," (DDI Opening Brief at 4:18), yet the Market Study makes no mention of this. DDI contends that the Market Study shows that the "Canoga Park location has been rejected by FCA," (*id.* at 4:19-20), yet the Market Study does not offer any "rejection" of Canoga Park, but merely extolls the positive aspects of the neighboring area of Woodland Hills, which is consistent with the testimony of every FCA US witness at the Hearing. These and other errors are addressed more fully below.

a. The determination of gross loss among different dealers has no impact on the Board's analysis

DDI argues that the Glendale and Van Nuys Trade Zones are responsible for a greater number of lost sales than the sales lost in DDI's trade zone. (DDI Opening Brief at 19:18-24.) As an initial matter, this is not a termination proceeding for the Van Nuys and Glendale dealers– it is for DDI, based on the numerous operational deficiencies at the dealership leading to a half decade of severe underperformance. DDI's failed effort to point to the underperformance of other dealers does nothing to alleviate the evidence of its own underperformance. Likewise, DDI's evidence of the performance of other dealers adds nothing to the Board's good cause analysis under Section 3061.

Further, DDI confuses the concept of loss and the "gross loss" measured in the Market Study. (Ex. 189 at FCA_0025782 (indicating "Gross Loss" for various Trade Zones).) The Van Nuys and Glendale dealers may experience a higher number of lost sales because its territory is much larger and more active, and its corresponding sales responsibility is much larger. However, though DDI does not address it, the dealers in these Trade Zones experience a lower amount of <u>relative</u> loss than DDI. In other words, these dealers sell a number of vehicles that is closer to their expected number of sales—i.e., their MSR requirements—and therefore experience fewer lost sales as a percentage of their MSR requirement. Not only do these dealers consistently attain a higher level of their MSR achievement than DDI, they also sell far more vehicles than DDI.

b. MSR accounts for DDI's severe underperformance relative to Honda and Toyota

DDI merely reiterates its unfounded argument that MSR is unable to account for so-called "import bias." As explained above and in FCA US's Opening Brief, DDI does nothing to show that these other brands perform differently in the San Fernando Sales Locality than in any other part of California, and indeed Toyota performs below expected. (Section II.A.3.a, *supra*; FCA US Opening Brief § IV.A.1.) Further, as previously discussed, MSR provides Trade Zone specific adjustments that would account directly for DDI's own underperformance due to, among other things, the strength of the Honda and Toyota dealers surrounding DDI. (*Id.*) DDI's discussion of the Market Study adds nothing to this unpersuasive argument.

c. DDI's poor performance with selling the Dart is only one of numerous vehicles that it is unable to sell

DDI claims that the Dodge Dart contributes the largest number of expected sales to DDI's MSR requirement. This is incorrect; the Dodge Challenger tends to have the greatest number of expected sales for DDI's Dodge franchise, and the RAM 1500/2500/3500/MegaCab tends to have the greatest number of expected sales for DDI's RAM franchise. (*See, e.g.* Ex. R326 at 012; Ex. R327 at 012; Ex. 328 at 012.) Regardless, as explained in FCA US's Opening Brief, DDI has fallen far short of its MSR requirement for numerous vehicle lines carried by the dealership—including, but not limited to, the Dart—for the past half-decade. (FCA US Opening Brief §IV.A.2.) In some years, DDI failed to meet its MSR requirement for <u>each and every vehicle line the dealer carried</u> for its Dodge franchise. (*Id.*; Ex. R329 at 012; Ex. R328 at 012.) Moreover, DDI's continued criticism of the Dart's smaller market share betrays its ignorance of how MSR is calculated. Though DDI does not address this point, the Dart's market share, in the compact segment, is calculated based on actual registration data. (FCA US Opening Brief § IV.A.1.) The Dart's market share, in turn, drives DDI's MSR requirement for the Dart, and significantly reduces the MSR requirement, in addition to DDI's fair share apportionment. (*Id.*) Thus, in 2015, out of 33,570 cars sold in the San Fernando Sales Locality falling into the compact segment, DDI was responsible for selling only 101. (*Id.* at 26:8-21, 27:25-28:17.) Though 33,570 compact cars were registered in the San Fernando Sales Locality in 2015, DDI was able to sell only 23 Darts in the calendar year, making up only 22.77% of its MSR requirement.[8]

d. DDI's repetitious argument regarding luxury brands is unavailing

DDI merely repeats its argument that it should not be forced to compete with so-called "luxury" brands. As explained above and in FCA US's Opening Brief, this argument fails. (Section II.A.2.f, *supra*; FCA US Opening Brief § IV.A.3, 35:16-36:2.) DDI's description of the Market Study adds nothing to this analysis, except to confirm Frith's conclusion that DDI's performance remains far below its contractual requirements regardless of how the segmentation is applied.

e. DDI's argument regarding alternative fuel vehicles is inaccurate

DDI again repeats the same arguments made elsewhere in its Opening Brief, arguing that it should not be forced to compete with alternative fuel vehicles. However, DDI's argument misrepresents the contents of the Market Study. The Market Study draws no conclusions at all regarding alternative fuel vehicles, and DDI's assertions in this regard are pure speculation devoid of any supporting evidence. To the extent the Market Study does analyze the presence of alternative fuel vehicles in the San Fernando Sales Locality, it parallels the analysis of Frith showing that these vehicles have an insignificant impact on FCA US's brand performance. (Ex. 189 at FCA_025789; *see also* Section II.A.2.g., *supra*; FCA US Opening Brief § IV.A.3, 35:6-15.)

f. Each and every FCA US representative at the Hearing, as well as the Sternfelds themselves, confirmed that DDI's dealership would have more advantages in Woodland Hills

DDI disingenuously claims that FCA US had failed to disclose that it would prefer that DDI relocate to Woodland Hills, and that the Market Study revealed this surreptitious intent. Nothing could be further from the truth. Instead, numerous FCA US representatives testified that Woodland Hills would be a preferred location for DDI's dealership, which was often discussed with DDI. (R.T. Vol. I, 201:14-19 (Weeks); R.T. Vol. IV, 128:3-6 (Tangeman); R.T. Vol. VIII, 62:8-10, 102:17-19 (Chandler); R.T. Vol. VIII, 159:13-14 (Nevers).) Indeed, the Sternfelds themselves agreed that

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[8] DDI's effort to pick and choose the vehicles it should be responsible for is unavailing. DDI is responsible under the Dealer Agree to effectively sell all Dodge and Ram vehicles—not just the ones it chooses. Further, DDI's attempt to write out the Dart from its MSR requirement makes little sense. Under that theory, FCA US should be able to remove from the MSR calculation the vehicle lines that DDI sold most effectively.

Woodland Hills would be preferable to DDI's current location, though they never took any action to relocate. (R.T. Vol. XIV, 166:24-167:6 (E. Sternfeld).) In fact, the Sternfelds had expressed their intent to relocate as early as 2007 when they first took over DDI, though they never honored this commitment with a firm proposal. (Exs. R307, R308.) However, while the parties are in agreement that Woodland Hills is a preferable location, the fact remains that the business decisions of DDI's own operators are the sole cause of DDI's chronic underperformance and material breaches of the Dealer Agreement. One such operational decision was the Sternfelds' choice to remain in Canoga Park. (FCA US Opening Brief §IV.A.5.ii.)

g. DDI misrepresents the demographics of the area surrounding its dealership

DDI points to a map contained in the Market Study showing income distribution throughout the San Fernando Sales Locality, arguing that DDI's location is not competitive because it is not immediately surrounded by the wealthiest inhabitants. This argument lacks any supporting authority or expert analysis, and is simply incorrect. Even a cursory examination of the map DDI relies on shows that each and every one of the FCA US dealerships in the San Fernando Sales Locality is similarly situated, surrounded immediately by a population that appears to earn $25,000-$75,000, and is circumscribed by a population that appears to earn $75,000 or more. (Ex. 189 at FCA_025820.) In other words, DDI's location is similiar to other FCA US dealers' locations in terms of income distribution. This straight forward conclusion comports with Frith's expert analysis, which showed that the population density and income levels of DDI's Trade Zone are sufficient to support robust sales of Dodge and RAM products, and indeed that the sales in this geography are robust for other FCA US dealers. (Ex. 422A at 061-062, 067-068; R.T. Vol. X, 86:8-91:23, 93:8-94:12 (Frith).) DDI's assertion is not supported by the evidence it cites, and is contradicted by Frith's expert analysis.

5. <u>Frith's testimony and report provide conclusive proof that DDI's chronic underperformance is caused by its operator's own business decisions</u>

The various elements of the MSR calculation all act to account for any peculiarities in a dealer's particular Sales Locality and Trade Zone, and in so doing are able to account for local conditions. By employing these variables, FCA US provides "adjustments for the type of vehicles that people want to buy in the area. [FCA US] . . . further adjusts for local conditions. So this is a pretty typical way of looking at expected or MSR in an area. And [FCA US] . . . actually goes a little bit farther in adjusting than many manufacturers do." (Frith Test., Tr. Vol. X at 50:9-18.) Despite DDI's arguments to the contrary, Frith's report and testimony offered clear, objective proof that MSR is reasonable and that DDI's failings are the result of the Sternfelds' continued mismanagement of the business.

a. Frith's analysis was based on statistically reliable data; Stockton's was not

DDI contends that Frith only relied on FCA US's MSR reports in conducting his analysis. (DDI Opening Brief at 22:9-26.) This is clearly incorrect, and DDI's exaggerated invective calls all of the arguments it puts forward into question. Though neither DDI nor Stockton addressed it at the Hearing, Frith's report contains several hundred pages of supporting data and supplemental backup data. (*See generally,* Exs 422A, 422B, 422C, 422D.) This data, in turn, covered a broad variety of topics relating to all of the varying aspects of DDI's sales territory and operations, such as: demographic information of the population surrounding DDI, including income levels, education levels, and employment levels; geographical properties of the San Fernando Sales Locality and Woodland Hills Trade Zone, including proximities by air distance, drive distance and drive time; pictures showing the physical properties of the dealership and the surrounding area; information regarding DDI's financial condition and operating expenditures, including advertising, personnel, and assets; information regarding DDI's neighboring dealers, including geographic distribution and historical performance; and the list goes on.

Of course, as DDI devotes nearly thirty pages of its thirty-nine page Opening Brief to criticizing FCA US's MSR calculations, Frith's report and testimony also included a rigorous analysis of the MSR performance standard and the specific MSR achievement data collected for DDI. DDI's statement that Frith "simply adopts FCA's MSR conclusions as a driving premise for his analysis" is wholly inaccurate and patently false. Frith subjected MSR, as applied to DDI and the San Fernando Sales Locality and Woodland Hills Trade Zone, to a battery of tests designed to provide objective, statistically sound evidence that the standard is reasonable as applied. Frith compared DDI's historical MSR performance against two different performance measures—expected sales based on both historical state average and historical national average—as a means to "test" the reliability of DDI's MSR requirements. (Ex. R422A at 005 ¶9, 033; R.T. Vol. X, 52:14-53:6 (Frith); Vol. XI, 69:14-71:9 (Frith).) As Frith's report and testimony demonstrate, DDI's expected sales based on MSR is actually more conservative than they would be based on a straight application of the state or national averages. (*Id.*)

DDI contends that Frith's analysis contains certain erroneous assumptions, but does not explain why those assumptions are invalid. And indeed, they are not even assumptions, but factual conclusions supported by evidence. For example, DDI claims that Frith "assumes any deviation from 100% MSR achievement is due to operational deficiencies." To the contrary, Frith analyzed various aspects of DDI's geography, market, and sales objectives, and drew the factual conclusion that these were <u>not</u> the cause of DDI's underperformance. (*See* FCA US Opening Brief §IV.A.4.) Frith then performed additional, data-driven analysis of DDI's operational practices and concluded, based on the data collected, that these operational deficiencies are the root of DDI's chronic underperformance. (*Id.* §§IV.A.4.i-iv.) As another example, DDI claims that Frith assumes MSR predicts actual sales opportunity. In essence, DDI's argument is tantamount to saying that it is impossible to predict or even estimate sales opportunity, and that it should not be done. In any event, DDI is incorrect, as the data MSR is founded on is retroactive, based on registration data of cars <u>actually sold</u>. (*See* FCA US Opening Brief §IV.A.1, 24:4-21.) DDI's criticisms of Frith's report are exaggerated, incorrect, and unavailing.

By contrast, Stockton's report contained numerous erroneous assumptions and intellectually dishonest and unsupported assertions. Further, Stockton did not offer any alternative method that could be used to gauge DDI's performance. Ultimately, Stockton's erroneous conclusions are based primarily on his failure to acknowledge the numerous variables that make up the MSR calculation which act to tailor MSR to the local market in which it is being employed.

b. Frith offered straightforward, objective analysis; Stockton did not

DDI complains that Frith's analysis improperly combined DDI's performance for Dodge and RAM in certain parts of his report. (DDI Opening Brief at 23:1-24:6.) However, DDI's argument is in direct contradiction to the Board's mandate in this termination proceeding: to consider all "existing circumstances" in evaluating whether DDI's termination should be affirmed. Section 3061. DDI's overall performance constitutes its "existing circumstances." Indeed, Frith's analysis of the overall performance of the dealership embodies "what we're looking at for the store. How is the store doing? This is how they're doing." (Vol. XI, 67:9-11 (Frith).) Likewise, DDI contractually agreed to meet its MSR requirements for each and every vehicle line carried by the dealership, not just Dodge or RAM, and so the performance of all the vehicles carried by the dealership in order to assess the magnitude of DDI's contractual breaches. (Ex. R302 §11(a).) And in any event, DDI completely ignores the numerous aspects of Frith's report and testimony where DDI's Dodge and RAM are evaluated separately. (*See, e.g.* Ex. 422A at 027, 030; Ex. 422B at 124-130, 131-132, 152-155, 228-239; Ex. 422C at 300-311.) DDI also ignores the numerous operational deficiencies that Frith pointed out as the true cause of the dealership's underperformance. (*See* FCA US Opening Brief §IV.A.4.)

DDI takes issue with a penetration profile included in Frith's report that shows DDI is far less effective at selling FCA US products to consumers nearest to it than other, similarly situated Dodge and RAM dealers. (Ex. 422A at 075.) As the profile makes clear, and contrary to DDI's argument, the data used by Frith only relates to Dodge and RAM franchises, and has nothing to do with other franchises as DDI contends. Indeed, this profile parallels the results of pump-in reports, which were made directly available to DDI, showing that its local customers are driving many miles from their homes to purchase FCA US products from other dealers and not DDI. (Ex. 334, 335; R.T. Vol. X, 75:23-77:12 (Frith); R.T. Vol. V, 40:22-41:1 (Cholagh); *see also* Ex. R422C at 293-295.) Amazingly, DDI's Opening Brief does not address these pump-in reports or their great significance to this termination proceeding. Though DDI contrives the above superficial, incorrect criticisms of Frith's analysis, it is unable to come forward with any concrete, factual evidence that would refute Frith's clear conclusion: that DDI is chronically unable to capture the business available to it, and that this is correlated directly with its operator's poor business decisions.

In contrast, Stockton's report was rife with ambiguities, unsupported conclusions, and assertions that simply had no basis in fact. Stockton performed his analysis using data that was unreliable, and had no knowledge of the FCA US dealers used in his composite comparison data. (R.T. Vol. XII, 198:9-15 (Stockton).) For example, Stockton opines that DDI's sales achievement should actually be 87.6%. However, Stockton provides no explanation of what this is a percentage of. Notably, if Stockton purports to cast this as a percentage of MSR, and following DDI's argument addressed above, 87.6% constitutes a failing grade. But Stockton does not provide this explanation, and DDI's reliance on this calculation is improper. Similarly, Stockton employed a map of FCA US's registration effectiveness across California for the proposition that DDI should not be able to meet MSR objectives as assigned, which Frith explained "clearly misrepresents what's going on in LA County." (R.T. Vol. X, 211:2-12 (Frith).)

As another example, Stockton claimed in his report that dealer incentive programs, which are available to all dealerships, are "a proxy system of preferential contracts" that somehow are "not legal in the retail automotive industry." (Ex. P181 at ¶¶ 11, 52.) These accusatory statements are neither supported by the record or Stockton's analysis. Neither Stockton's report nor his testimony at the Hearing offered a substantiated basis for his opinion that MSR is an invalid performance metric.[9]

c. Frith's rebuttal report identified Stockton's numerous mistakes

Frith's rebuttal report (Exs. 422C, 422D) clearly demonstrated that Stockton offered no substantiated basis for his opinion that MSR is an invalid performance metric, nor does Stockton offer any support for his conclusion that the economic conditions affecting DDI are not affecting every other surrounding dealer. DDI does not attempt to rejuvenate Stockton's unsupported analysis by explaining that analysis, but rather by attacking Frith's criticisms and attempting to cast them in a negative light. (DDI Opening Brief at 24:7-25:11.) For example, DDI's Opening Brief details at great length a linguistic ambiguity regarding Stockton's description of MSR, and also a disagreement over the unreliable data Stockton used in his analysis. The fact that these are DDI's main criticisms is telling of the weakness of its own arguments. DDI is stuck on these points because it has no valid criticisms of Frith's analysis and is unable to defend the validity of Stockton's

[9] As Stockton admitted during his testimony, a California Superior Court recently rejected his expert opinion on the sales performance of an FCA US dealer in a separate litigation. (Vol. XII, 125:6-126:3 (Stockton).)

incomplete and irrational analysis.

At the end, DDI's arguments are mere distractions that have no relevance regarding the Board's determination of whether good cause has been shown under Section 3061 to terminate DDI's franchises. Indeed, DDI appears to have inserted these arguments as a diversion, attempting to shift the focus away from the actual merits of this case and the evidence showing DDI's severe underperformance. Though it is important that Stockton made substantive assertions that were factually misleading, it is irrelevant to this Board's analysis that Stockton and Frith disagreed on certain aspects of Stockton's statistical analysis.

d. Frith's report and analysis parallels the contents of the Market Study

DDI complains that Frith's report is contradicted by the contents of the Market Study, but its primary argument is that Frith categorized household incomes split up into different ranges from the ranges applied in the Market Study. As Frith and FCA US did not collaborate on the Market Study, it is unsurprising that their reports might have these non-substantive differences in formatting. However, DDI does not dispute, nor can it, that the actual, substantive data expressed in the Market Study and Frith's report are consistent with one another. DDI's argument that the presentation of household incomes has any effect at all is a disingenuous, makeweight argument. As with others, DDI's exaggerated claims on this point are made without any support or expert analysis.

DDI argues that Frith's conclusions regarding the effect of alternative fuel vehicles does not comport with the data expressed in the Market Study. Again, this makeweight argument is devoid of factual support or expert analysis and further undermines DDI's credibility. As explained above and in FCA US's Opening Brief, the results of Frith's analysis are nearly identical to those of the Market Study. (Section II.A.2.g., *supra*; FCA US Opening Brief § IV.A.3, 35:6-15.) Both the Market Study and Frith's report reveal that alternative fuel vehicles have a *de minimus* impact on overall FCA US sales, and likewise have no significant influence on DDI's severe underperformance. DDI's citation of a few insubstantial differences between Frith's analysis and the Market Study lead to the obvious conclusion—there is no substantial or meaningful difference between the two.

6. <u>DDI has fabricated the purported motives of FCA US in an effort to diminish the significance of DDI's half decade of underperformance</u>

As FCA US predicted in its Opening Brief, DDI has sought to reframe this termination proceeding to shift the focus away from the clear and compelling evidence of DDI's continued severe underperformance and the Sternfelds' sustained neglect of their business. Instead of addressing DDI's underperformance and failed business decisions head on, DDI has contrived the unsupported and irrational conspiracy theory that FCA US is pursuing this termination in order to combine the Dodge, RAM, Chrysler and Jeep brands and relocate them to Woodland Hills. As explained in FCA US's Opening Brief, DDI's conspiracy theory is incorrect. (FCA US Opening Brief § IV.G.) The fact that DDI dedicates this much of its argument to a theory unsupported by evidence is telling. It shows that DDI is unable to defend against the significant evidence revealed at the Hearing regarding DDI's inexcusably poor performance. DDI is clearly attempting to divert the Board's focus from these failings, yet this is nothing but a red herring that should be disregarded by the Board for lack of proof and, more importantly, lack of relevance.

DDI submitted various internal FCA US documents at the Hearing, containing somewhat ambiguous language, in an effort to show that this litigation is not truly about DDI's poor performance. DDI's characterization of these documents is misleading. Regarding DDI's Exhibit 144, Tangeman testified that he was not involved with the creation of the portion of the document referring to the consolidation of DDI. (R.T. Vol. IV, 90:3-91:6 (Tangeman).). Regarding DDI's Exhibit 149, Tangeman explained that FCA US did intend to "[l]everage legal pressure," including the present proceedings, to compel underperforming dealers to improve their performance and "buy-in" to the intentions and stated goal of the Upgrade Program—to improve dealer performance. (R.T. Vol. III, 140:5-15 (Tangeman); Ex. 149 at FCA_002339.) Tangeman further cited examples where he had successfully taken this approach to cause dealers to "buy in" and improve their performance on numerous occasions. (R.T. Vol. IV, 98:18-100:20, 220:14-221:5, 221:15-222:4, 222:25-223:16 (Tangeman).)

As explained fully in FCA US's Opening Brief, DDI's theory makes no sense and is in direct contradiction to the evidence introduced at the Hearing. DDI claims that FCA wanted to combine the brands, yet does not explain why Tangeman did not even contact DDI when he received a buyer's assist letter from the Chrysler Jeep dealership across the street, which could easily have resulted in a combination of the brands. Nor does DDI explain why FCA US would attempt to sell the neighboring Chrysler Jeep dealership to Nouri, since Nouri informed FCA US that he had no plans to relocate the operation to Woodland Hills. Nor does DDI explain how the Market Study bears any connection to this theory, since each and every FCA US witness testified that FCA US's stated purpose for many years was to relocate the dealership to Woodland Hills. Indeed, DDI committed to relocating the dealership as far back as 2007. DDI's conspiracy theory is unsupported by fact or logic. These proceedings exist for only one reason: "just a lack of performance from the dealership. They're not getting the job done." (R.T. Vol. VIII, 62:23-63:3 (Chandler).)

7. **DDI's Opening Brief contains numerous incorrect record citations**

Many of the arguments put forward by DDI in its Opening Brief are called into question due to DDI's incorrect and misleading representation of evidence made in support of those arguments. While many examples of DDI's incorrect citations to Hearing exhibits and testimony are pointed out throughout FCA US's Reply Brief, the following specific examples are representative of DDI's inaccurate citations:

- DDI cites to the testimony of Frith for the proposition that FCA US "attempt[ed] to conceal the new segment definitions," (DDI Opening Brief at 15:14-16), yet Frith's report contains the complete segmentation amendments made by FCA US in 2016, (Ex. R422D at 341-50), and the acknowledgement by FCA US representatives that these amendments had been made. (R.T. Vol. VIII, 80:20-25 (Chandler); *Id.* at 221:17-23 (Nevers).)
- DDI cites various exhibits for the proposition that the "Dodge Dart contributes the largest number of expected sales pursuant to FCA's MSR metric." (DDI Opening Brief at 20:12-13.) This assertion is incorrect. (*See* Section II.A.4.c, *infra.*)
- DDI cites to Nouri's testimony, claiming that Nouri stated that he "would need all four in order to successfully move to Woodland Hills." (DDI Opening Brief at 27:26-28), yet Nouri simply did not testify to this point. (*See generally* R.T. Vol. VII, 4:1-

104:1 (Nouri).) DDI further claims that Nouri "refused to execute a written commitment to relocate to Woodland Hills," (DDI Opening Brief at 27:25-26), but does not cite to any record testimony, and indeed none exists on this point.

- DDI claims "FCA never advised the dealership what an 'adequate' level of advertising would be," (DDI Opening Brief at 30:3-4), yet the cited testimony does not speak to this proposition, and indeed Ed Sternfeld acknowledges that DDI was advised to "spend most of my money on the internet side." (R.T. Vol. XIV, 121:15-20 (E. Sternfeld).)
- DDI cites to Walter's testimony, claiming he "acknowledged [DDI's] land, facility and improvements made to the facility are substantially permanent investments." (DDI Opening Brief at 33:18-19.) Not only does the cited testimony not address these issues at all, but Walter's report and testimony came to the exact opposite conclusion. (*See* FCA US Opening Brief § IV. B.1, 63:3-14.)

B. FCA Clearly Demonstrated That DDI Has Not Made the Necessary Investments to Sustain Its Business

As described in FCA's Opening Brief, DDI has not made sufficient investments in its business to adequately compete with the market in which it is situated. The inadequacies of these efforts are a direct cause of DDI's severe under performance. (*See* FCA US Opening Brief § IV.B.) Indeed, in an effort to argue MSR is an unreasonable metric, DDI makes numerous arguments that actually show that DDI has not made the necessary investment in its dealership.

1. <u>DDI's insufficient upgrades were not voluntary, and were not made until termination was all but certain</u>

DDI boasts that it replaced its brand signage in 2015 and also remodeled its bathrooms to become ADA compliant. However, as explained in FCA US's Opening Brief, DDI's decision to remodel its bathrooms was the result of an ADA lawsuit filed against the dealership and was only performed to minimize its exposure to that liability. (FCA US Opening Brief § II.C., 7:3-6.) Likewise, DDI had committed to remodel its facilities or relocate as far back as 2007. (Exs. R307, R308.) And as far back as May, 2011, DDI was given $50,000 by FCA US to use toward its signage upgrades, as the dealership's signs at that point dated back several decades. (FCA US Opening Brief

§ IV.A.4.ii, 44:15-46:21; Ex. R315; Ex. R316.) Yet it was not until months into 2015, eight years after DDI's initial commitment to remodel, after the Notice of Default had expired and this termination was all but certain, that DDI finally used FCA US's contribution to upgrade its signage. (*Id.*) These upgrades were insufficient, as DDI acknowledges in its Opening Brief that the dealership showroom is still in significant need of rehabilitation. (DDI Opening Brief at 38:2-3.) Given the Sternfelds' past reluctance to invest in their business, it is highly unlikely that this work will ever be performed. Indeed, given the timing of DDI's listed upgrades, it appears that these efforts were only undertaken as strategy to make the dealership look more favorable at the Hearing.

2. **<u>DDI's advertising expenditures are inadequate and are a significant factor explaining its underperformance</u>**

As explained in FCA US's Opening Brief, DDI's advertising is insufficient and, as acknowledged by the Sternfelds, is dwarfed in comparison to the advertising investments made by neighboring dealers. (FCA US Opening Brief § IV.A.4.i.) DDI lists several sources of advertising, such as Kelley Bluebook and AAA. However, this merely proves that DDI does <u>some</u> advertising, not that it does <u>adequate</u> advertising to capture the business available to it. It does not. As explained by both Frith and Walter, DDI spends far less on advertising than other surrounding dealers and far less than would be required to drive sales to meet its MSR. (*Id.* at 42:6-19.)

DDI's contention that it spends more on advertising per vehicle sold than other FCA US dealerships is misleading. DDI attempts to support this assertion with several citations to Stockton's Hearing testimony, yet none of the cited testimony adequately explains this proposition. Instead, Stockton asserts that it would be "rational behavior" for DDI to advertise less than its competitors because it is less successful at drawing in new customers. (R.T. Vol. XII, 98:9 (Stockton).) Stockton's conclusion is no more than a failed attempt to justify DDI's self-defeating business practices and lack of investment. This argument is also misleading because DDI's advertising cost per vehicle sold would be expected to be higher given its lower sales.

Indeed, when compared to West Valley's advertising expenditures, and corresponding sales results, it becomes obvious that DDI's refusal to invest in its advertising is a primary cause of its chronic underperformance. As explained in FCA US's Post Hearing Brief, West Valley is able to far outperform DDI in an essentially identical location, and at least one aspect of this success is the fact that the dealership spends nearly four times what DDI spends on its advertising. (FCA US Opening Brief §IV.A.4.i, 42:20-43:12.) DDI's operators admitted that this was one of the weakest parts of the business, and Ed Sternfeld acknowledged that it was an "Achilles heel" that he did not have a fully functional internet advertising department. (R.T. Vol. XIV, 120:11-17 (E. Sternfeld).) DDI's minimal investment in advertising is clearly insufficient and a leading driver of its poor performance.

3. DDI's list of selective investments does not make up for the substantial investments that were not made

DDI lists purported "investments" in Business Link and other infrastructure related to its wholesale parts business. These expenditures are inadequate and pale in comparison to the investments made by other similarly situated dealers. Moreover, DDI does not offer any evidence to show that these same expenditures have not been made by most FCA US dealers. Nor does DDI explain why the dealer that would replace DDI following this termination would not make these exact same expenditures. The expenditures listed by FCA US are not investments, but are operational expenditures that are not unique to DDI.

4. DDI's current inventory is highly inflated and is typically far lower

Just as DDI likely performed its signage upgrades in reponse to this termination process, it also deliberately inflated its inventory in the few short months leading up to the Hearing. This is evidenced by the fact that, in the past year, DDI has exceeded its floor plan lending by over $1 million, holding 124% more inventory than it typically held in the past. (*See* FCA US Opening Brief, §IV.4.A.iv., 52:10-24.) Though DDI contends that it is currently at the inventory levels recommended by FCA US, this was clearly a manufactured presentation designed to make DDI look more favorable before the Board. However, a review of DDI's financial statements from the immediately preceding years clearly reveals DDI's true practices of holding as little inventory as possible. (*Id.*) Indeed, in the recent past, DDI had roughly half the inventory it presently holds. (*Compare* Ex. R322 at 1 (showing $2,916,725 in inventory); *with* Ex. J-4_0377:2-9 (testifying that DDI is "over line right now" with "$5.8 [million] in new" vehicle inventory).) When at its normal levels, DDI's operators admit that there are times when the dealership has not carried sufficient inventory to meet its MSR requirements. (R.T. Vol.. XIV, 173:5-8 (E. Sternfeld.) And in the past, DDI frequently declined to order much of the inventory allocated to it on a monthly basis. (R.T. Vol. I, 100:6-11 (Weeks).) DDI's insufficient inventory is another cause of DDI's chronic underperformance.

5. <u>DDI has not retained or trained adequate sales staff</u>

As FCA US explained in its Opening Brief, DDI has not retained and trained adequate sales staff. (FCA US Opening Brief § IV.A.4.iii.) DDI asserts that it pays its sales staff more than other dealers. Yet this assertion is directly contradicted by Walter's testimony and report—which is not addressed in DDI's Opening Brief—showing that DDI's employees are paid far less than average and, unsurprisingly, sell far fewer cars than average. (*Id.* at 47:18-48:9.) DDI also argues that FCA US failed to show that DDI's employees are unqualified. To the contrary, FCA US presented documentary evidence showing DDI's failures in adequately training its sales staff, which its operators also acknowledged. (*Id.* at 49:11-21; Ex. R378; R.T. Vol. XIII, 71:5-72:3 (J. Sternfeld).) The Sterfelds similarly admitted that they held no in-house training for any of DDI's managers. (R.T. Vol. XIV, 153:8-10 (E. Sternfeld).)

Though DDI's Opening Brief does not address it, DDI's inadequate staffing is most noticeable as to its internet advertising department, which Ed Sternfeld lamented was an "Achilles heel" for the dealership. (R.T. Vol. XIV, 120:11-17 (E. Sternfeld).) Specifically, until recently, the entire department was managed by a convicted felon who had previously had almost no experience in the automotive industry, and no experience with internet sales. (FCA US Opening Brief § IV.A.4.iii, 49:22-50:13.) This oversight by DDI's operators is critical to its business, as DDI's internet advertising presence is one of the primary keys to overcoming the difficulties that the Sternfelds' claim result from its Canoga Park location. Yet the Sternfelds have not made the necessary investments in DDI's internet department, and its internet staff continues to be inadequate and unqualified. DDI's lack of trained personnel is a leading driver of its chronic underperformance. Good cause exists for DDI's termination based on its lack of investment.

C. FCA Clearly Demonstrated That DDI Has Not Made Investments of a Permanent Nature

As one of its central themes, DDI contends that it is a forty-five year old business that should not be terminated because it has not yet gone out of business. However, while the Sternfelds' late father did open the dealership many years ago, the Sternfelds did not assume control of DDI until 2007 when they executed the Dealer Agreement. (Exs. 301, 302.)

DDI argues that its real estate investment constitutes a permanent investment. However, DDI does nothing to address the fact that the building and property are owned by the Sternfelds as a separate investment from DDI, and is not a permanent investment in the dealership. (*See* FCA US Opening Brief § IV.B.1.) Indeed, if this termination is successful, the Sternfelds could sell or rent the property, and its "value goes way up." (R.T. Vol. XIV, 61:16-21 (E. Sternfeld).) Though DDI contends that nearly every aspect of the dealership's facilities constitutes a permanent investment, most of these assets could be sold or rented out to an incoming tenant or other purchaser. This would be especially true if the Sternfelds permitted a replacement FCA US dealer to occupy DDI's real estate, as Nevers testified would be an expedient solution. (R.T. Vol. VIII, 179:11-18 (Nevers).) DDI also attempts to diminish the fact that the majority of the assets held by the business are cash and cash equivalents. (*See id.* § IV.B.3, 64:27-65:9.) Yet this aspect of DDI's business is very significant, as this cash would surely go with the Sternfelds upon DDI's termination.

Though DDI attempts to frame itself as a decades-old enterprise with substantially permanent investments, this is simply not the case. The Sternfelds have operated DDI since only 2007, and have starved the business of the investments it would need to succeed. The dealership's lack of permanent investment is another reason why this termination is necessary.

D. FCA Clearly Demonstrated That the Public Welfare Would Benefit Greatly from DDI's Termination

DDI claims that it offers many benefits to its community which would be lost if it is terminated. Yet DDI does nothing to explain why these same benefits could not be provided by the dealer who would replace DDI. Indeed, the dealer that will eventually replace DDI would surely provide far greater benefits to its community than DDI is presently able to. DDI has severely underperformed for years, and the public is harmed by having to drive miles away to purchase the same cars and the same services offered by DDI, but from more competent dealers. DDI further confuses this issue with its speculative assertion that FCA US would not find a replacement for DDI.

1. DDI's operation harms its community

In an effort to prove that it provides some benefit to its community, DDI offers that its wholesale parts operations sells parts to other areas of Los Angeles and that it offers Business Link services. These sparse offerings of value are tantamount to an admission by DDI that it does not offer competent services or benefits to its community. Indeed, DDI does nothing to address the several ways its presence in Canoga Park is harmful to its residents.

DDI does not address the pump-in reports offered at the Hearing, which shows that the residents of Canoga Park are forced to drive many miles from their homes to purchase FCA US products from dealers other than DDI. (FCA US Opening Brief § IV.C., 68:8-22.) This significantly harms consumers in terms of customer convenience. A more productive dealer would offer far greater customer convenience to the inhabitants of the Woodland Hills Trade Zone, as these individuals could remain in their own neighborhood to purchase FCA US products and automotive service. A more prolific dealer would likewise generate greater tax revenues for its community, and also create more jobs. DDI also confuses this issue by arguing that, if a new FCA US dealer were to relocate to a more productive area in Woodland Hills, Canoga Park would lose tax revenues. This argument fails to acknowledge the geography of this area, as Canoga Park is contained within Woodland Hills, and DDI has not put on any evidence that Canoga Park is a separate taxing entity.

DDI also fails to address the Sternfelds' refusal to conduct business with a significant portion of the Canoga Park community – consumers with poor or "sub-prime" credit. (*Id.* at 66:14-68:7.) Ironically, DDI expends much of its efforts in its Opening Brief criticizing its current location as economically depressed, yet its operators have made the business decision to remain in their current location but not to serve a major part of this economically depressed community. DDI does nothing to address the significant harm it visits upon the Canoga Park community by its failure to serve individuals with poor credit.

Further, as explained in FCA US's Opening Brief, the evidence presented at the Hearing shows that DDI consistently prices most of its vehicles far higher than competing FCA US dealerships. (*Id.* at 68:23-70:18.) As explained in the Opening Brief, these non-competitive pricing practices either force DDI's customers to pay higher prices than they otherwise would, or forces them to travel outside of their community to purchase the same car from another FCA US dealer. This not only harms DDI's community, but explains much of its poor sales performance. (*Id.*)

2. <u>FCA US intends to immediately replace DDI with a more prolific dealer that will provide significant jobs, tax revenue, and FCA US products to DDI's community</u>

DDI does not rely on any evidence presented at the Hearing for its assertion that FCA would not replace DDI if termination was successful. To the contrary, every single witness who was questioned on this issue responded that the dealer would be replaced. (*See, e.g.* R.T. Vol. VIII, 61:7-17 (Chandler) ("I was a national dealer placement manager for five years. I know what the plan is for Canoga Park/Woodland Hills, and it is to have a dealership there."); R.T. Vol. VIII, 178:21-23 (Nevers) ("Q: How long do you anticipate it would take to get a replacement dealership? A: I would estimate from the moment I would start, 30 to 60 days.")) As Nouri acknowledged, the Woodland Hills Trade Zone is "the closest location to the best location on earth"– it goes without saying that FCA would not miss the business opportunity to have a productive dealer in this territory. DDI has not introduced any evidence to the contrary, nor could it. (R.T. Vol. VII, 99:14-21 (Nouri).)

DDI's assertion that DDI's replacement would not be located in Canoga Park is without support. Various FCA US representatives testified that FCA US has no definite plans to relocate to Woodland Hills, nor had any steps been taken to secure a location in Woodland Hills for a dealership. (R.T. Vol. IV, 129:1-17 (Tangeman); R.T. Vol. VIII, 104:16-105:4 (Chandler); R.T. Vol. V, 171:24-172:8 (Cholagh).) In any event, to the extent that an FCA US dealer located in Woodland Hills would be able to generate more vehicle sales, tax revenue, and employment opportunities, the Woodland Hills community—of which Canoga Park is a proximate part—would benefit.

E. FCA Clearly Demonstrated That DDI Is Unable to Meet the Needs of Its Consumers

As explained in FCA US's Opening Brief, the fifth good cause factor under Section 3061 is clearly satisfied, as FCA US has clearly shown that DDI is unable to meet the needs of its consumers. (FCA US Opening Brief § IV.D.) Instead of addressing DDI's various flaws head on, DDI claims that FCA's purported sole reason for termination is DDI's failure to meet MSR. While DDI's severe sales deficiencies, going on over a half-decade, is certainly sufficient to provide good cause for this termination without more, *Ford Motor Co. v. New Motor Vehicle Bd.* at 5,[10] there are numerous reasons justifying DDI's termination, and which also satisfy the fifth good cause factor.

1. FCA US asserted numerous grounds justifying DDI's termination

DDI claims that the Notice of Termination was not sufficiently clear, and that DDI therefore only needs to prove that its sales were not deficient. To the contrary, the Notice of Termination clearly states, in all capitals and bold font, that FCA US was commencing this termination pursuant to "**PARAGRAPHS 28(B)(1), (II) AND (XIII) OF THE ADDITIONAL PROVISIONS OF THE DEALER AGREEMENT.**" (Exs. R361, R362 (emphasis in original).) Paragraph 28 of the Dealer Agreement, in turn, permits FCA US to terminate the Dealer Agreement based on DDI's failure to: meet its sales obligations pursuant to paragraph 11(a); maintain adequate service pursuant to paragraph 11(b); maintain up-to-date facilities pursuant to paragraphs 11(d)(i) and 11(g); retain and train qualified personnel pursuant to paragraph 11(f); and sufficiently advertise pursuant to paragraph 12. (Ex. R302 at § 28.) Despite DDI's refusal to recognize it, the Dealer Agreement was explicitly referenced in the Notice of termination, including DDI's breach of that agreement, in all bold, capitalized text. By reference to paragraph 28, FCA US incorporated each and every one of the

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[10] The single case DDI relies upon, *American Isuzu Motors, Inc. v. New Motor Vehicle Bd.* (1986) 186 Cal.App.3d 464, does not contradict the case law cited by FCA. Under Section 3061, the Board must consider all "existing circumstances" and apply those circumstances against all of the good cause factors. Section 3061; *see also Ford Motor Co. v. New Motor Vehicle Bd.* at 3-4 ("In determining whether good cause has been established, the Board must consider all of the factors set forth in section 3061 for which evidence has been presented from any party.") Indeed, both parties presented substantial evidence on all the good cause factors, and DDI's Opening Brief provides substantial briefing towards each factor. In this regard, DDI has waived its argument that the other good cause factors should not be considered. Moreover, the concern expressed by the court in *Isuzu* was that a dealer could be terminated for purported deficiencies that it had not been given sufficient notice of or an opportunity to correct, which could ultimately present concerns of due process. Unlike the issues faced by the court in *Isuzu*, here it is beyond doubt that DDI was on notice of the numerous deficiencies at the dealership, as it was constantly reminded of these deficiencies for years by FCA. FCA sent numerous written correspondence to DDI which detailed each and every deficiency that FCA provided evidence on in the hearing. To the extent DDI could claim it was not put on fair notice, such claim would be spurious.

numerous deficiencies and contractual breaches cited above and in FCA US's Opening Brief.

Of course, DDI had also been made well aware of these numerous deficiencies repeatedly throughout the years by both written correspondence and through in-person meetings with FCA's representatives. This is not a case where the dealer was blindsided by a termination that was not preceded with significant warning. In this case, DDI was given numerous opportunities over five years to acknowledge its short-comings, to make operational changes, and to improve. FCA offered significant assistance in this regard, and constant encouragement. DDI was well aware of its numerous flaws, yet its operators did nothing to restore its operations.

2. <u>DDI suffered from significantly negative customer service issues, among other things</u>

DDI attempts to downplay its inconsistent customer service and the considerable low rankings it has received throughout the years. As explained in FCA US's Opening Brief, DDI's CEI scores have placed it at the very bottom of FCA US dealers in its size category for customer service. (FCA US Opening Brief § IV.D, 72:22-74:2.) The evidence presented at the Hearing clearly shows that DDI's customer service is, at best, highly inconsistent.

3. <u>DDI's improvements are insubstantial and were commenced on the eve of this termination</u>

As stated above and in FCA's Opening Brief, each and every one of the improvements DDI has made in the last year were not of its own volition, but were spurned on either by threat of ADA litigation, because FCA provided substantial funding towards those renovations years before, or as a last-ditch effort to evade this termination and to create more favorable evidence to present at the Hearing. However, these efforts are insignificant and unavailing. Based on DDI's past record of resistance to investing in its own business, it is more than likely that DDI's operators would not provide the necessary investments to succeed in the future.

F. FCA Clearly Demonstrated That DDI Does Not Fulfill Its Warranty Obligations

As stated in FCA US's Opening Brief, although warranty was not the main focus of the Hearing, FCA US did introduce evidence indicating that DDI has failed to consistently honor these obligations which went uncontradicted by DDI. Though DDI did not address it, FCA US presented evidence showing that DDI's warranty submissions have been out of line with policies and procedures at times, (*see* Exs. R377, R380, J-4_0076:21-77:4, J-4_0083:14-17 (Clark Dep.)), which the Sternfelds acknowledge. (R.T. Vol. XIV, 181:15-182:22 (E. Sternfeld).) DDI has not consistently complied with its warranty obligations. DDI does not contest this fact and this factor weighs in favor of termination.

G. FCA Clearly Demonstrated That DDI Has Materially Breached Numerous Provisions of Its Franchise Agreements

Instead of actually addressing the Dealer Agreement, DDI argues that its numerous breaches of the Dealer Agreement are not in issue because FCA US did not sufficiently outline these breaches in the Notice of Termination. As explained above and in FCA US's Opening Brief, the Notices of Termination explicitly referenced key provisions of the Dealer Agreement in all capital, bold font, and also incorporated numerous other provisions to the Dealer Agreement by reference. Yet DDI's Opening Brief does not address or discuss a single provision of the Dealer Agreement. By completely ignoring the contents of the Dealer Agreement and attempting to characterize this as "a one issue case," DDI essentially concedes that it has no justifications for its numerous, material breaches of the Dealer Agreement over the past half-decade. DDI's failure to address its <u>numerous</u> contractual deficiencies is unsurprising given that DDI's operators did not even have a complete copy of the Dealer Agreement and were completely unfamiliar with its terms. (*See* R.T. Vol. XIII, 53:10-56:17 (J. Sternfeld).) The Sternfelds' self-imposed ignorance of their contractual obligations does not give them carte blanche to breach these obligations without consequence. DDI's continuous, material breaches of the Dealer Agreement establish good cause for DDI's termination.

In *Capacity of Texas, Inc. v. New Motor Vehicle Board*, the California Superior Court found that good cause had been established under Cal. Veh. Code Section 3061. It did so even though the manufacturer conceded that it could establish only one good cause factor: the extent of the franchisee's failure to comply with the terms of the franchise. No. 34-2014-80001848 (Cal. Super. Ct. Aug. 3, 2015), attached as Ex. A, at p. 3. The court nonetheless found that the dealer's actions had violated "the terms of the franchise agreement," which required the dealer to "use all reasonable endeavors to achieve maximum sales of [the manufacturer's] products." *Id.* at 6. The dealer's failure, the court concluded, "is 'cause' for termination under the express terms of the agreement." *Id.* Based on the dealer's breach of this single factor, the court found that the Board had erred in sustaining the protest. The court additionally found that good cause had been established based on the dealer's breach of the implied covenant of good faith and fair dealing and that its bad faith acts established good cause as part of the "existing circumstances" surrounding the termination. Here, as detailed in FCA US's Opening Brief, DDI breached no less than five provisions of the SSA, including Paragraphs 11(a)(failure to meet MSR), 11(b)(failure to provide adequately service), 11(d)(i)(failure to maintain adequate facilities), 11(f)(failure to retain and train qualified personnel) and 12 (failure to advertise). Ex. 302.

III. CONCLUSION

For the reasons outlined above and in FCA US's Opening Brief, which are amply supported by the evidence presented during the Hearing, good cause exists to terminate DDI's Dodge and RAM franchises.

Dated: January 25, 2017

DONAHUE DAVIES LLP

By: Mary A. Stewart
Robert E. Davies
Mary A. Stewart

NELSON MULLINS RILEY & SCARBOROUGH LLP
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PROOF OF SERVICE

CAPTION: DDI, INC., Protestant
v. FIAT CHRYSLER AUTOMOBILES, INC., Respondent

BOARD: NEW MOTOR VEHICLE BOARD

PROTEST NOS.: PR-2435-15, PR-2436-15

I am employed in the City and County of Sacramento, State of California. I am over the age of 18 years and not a party to this action. My business address is P.O. Box 277010, Sacramento, California 95827-7010.

On January 25, 2017, I served the foregoing **RESPONDENT FCA US LLC'S POST-HEARING BRIEF** on each party in this action, as follows:

Gavin M. Hughes, Esq.
LAW OFFICES OF GAVIN M. HUGHES
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Attorney for Protestant

☒ (BY MAIL) I caused such envelope to be deposited in the United States Mail at Sacramento, California, with postage thereon fully prepaid. I am readily familiar with the firm's practice of collection and processing documents for mailing. It is deposited with the United states postal service each day and that practice was followed in the ordinary course of business for the serve herein attested to.

☐ (BY FACSIMILE) The facsimile machine I used complied with California Rules of Court, Rule 2003, and no error was reported by the machine. Pursuant to California Rules of Court, Rule 2006(d), I caused the machine to print a transmission record of the transmission, a copy of which is attached to this Affidavit.

☐ (BY FEDERAL EXPRESS) I caused such envelope to be delivered by air courier, with the next day service.

☒ (BY E-MAIL) at the e-mail address listed above.

Executed on January 25, 2017, at Sacramento, California.

I declare under penalty of perjury that the foregoing is true and correct.

Erin Sanchez

Exhibit A

SUPERIOR COURT OF CALIFORNIA

COUNTY OF SACRAMENTO

CAPACITY OF TEXAS, INC. v. NEW MOTOR VEHICLE BOARD	Case Number: 34-2014-80001848 RULING ON SUBMITTED MATTER
GUARANTEED FORKLIFT, INC., dba GFL, INC.	Date: May 1, 2015 Time: 9:00 a.m. Dept.: 29 Judge: Timothy M. Frawley

Petitioner Capacity of Texas, Inc. challenges a decision of Respondent New Motor Vehicle Board granting an administrative protest of its notice to terminate the franchise of Real Party in Interest GFL, Inc. (GFL). Petitioner seeks a peremptory writ of mandate compelling Respondent to set aside its decision and issue a new decision, overruling the protest and allowing termination of the franchise agreement. The court shall GRANT the petition.

Introduction

Petitioner Capacity is a new motor vehicle manufacturer. Capacity manufactures terminal tractors (also sometimes referred to as "semi-tractors" or "yard trucks") under the trade name "Trailer Jockey." A terminal tractor is a specialty vehicle typically used to move semi-trailers over short distances, such as within a cargo/freight yard, shipping dock, warehouse facility, or distribution center. Although terminal tractors are not typically operated on public streets, two of the "Trailer Jockey" models manufactured by Capacity are available in a "DOT variation" that would allow the vehicles, if properly registered, to be legally operated on public streets in California.

Real Party in Interest GFL was an authorized Capacity dealer, authorized to sell and service the motor vehicles manufactured by Capacity, pursuant to the terms of a "franchise" agreement between Capacity and GFL referred to as the "Authorized Representative Agreement," dated July 17, 1995.

Respondent Board is an administrative agency of the State of California charged with (among other things) the responsibility to adjudicate certain franchise-related disputes between new motor vehicle manufacturers and their retail dealers.

By letter dated February 5, 2013, Capacity notified GFL and the Board of its intention to terminate GFL's franchise because GFL (1) misrepresented the employment status of a former employee who left GFL to work for Capacity's chief competitor, and (2) unlawfully allowed the former employee to continue accessing Capacity's confidential and proprietary "Online Parts Ordering System" while the former employee was working for the competitor.

The California Vehicle Code prohibits involuntary termination of a new motor vehicle franchise without "good cause." (Cal. Veh. Code § 3060.) If a franchisee contends that it has been terminated without good cause, the franchisee may file a protest with the Board. (*Ibid.*) When a protest is filed, the franchisor may not terminate the franchise unless and until the Board finds, after hearing, there is good cause for termination. (*Ibid.*) At the protest hearing, the franchisor has the burden of proof to establish good cause for termination. (Cal. Veh. Code § 3066.)

In determining whether the franchisor has established good cause, the Board is required to consider the "existing circumstances," including, but not limited to, the following seven factors:

(1) Amount of business transacted by the franchisee, as compared to the business available to the franchisee.
(2) Investment necessarily made and obligations incurred by the franchisee to perform its part of the franchise.
(3) Permanency of the investment.
(4) Whether it is injurious or beneficial to the public welfare for the franchise to be modified or replaced or the business of the franchisee disrupted..
(5) Whether the franchisee has adequate motor vehicle sales and service facilities, equipment, vehicle parts, and qualified service personnel to reasonably provide for the needs of the consumers for the motor

vehicles handled by the franchisee and has been and is rendering adequate services to the public.

(6) Whether the franchisee fails to fulfill the warranty obligations of the franchisor to be performed by the franchisee.

(7) Extent of franchisee's failure to comply with the terms of the franchise. (Cal. Veh. Code § 3061.)

In this case, GFL filed a timely protest with the Board, and the Board set the matter for hearing in December 2013. However, prior to the hearing, Capacity filed a Motion to Dismiss, arguing that the Board lacked jurisdiction to decide GFL's protest. Capacity argued that under the California Vehicle Code, the Board only has jurisdiction over protests involving franchisees of new motor vehicles subject to registration under the Vehicle Code. Capacity argues that because the vehicles it manufactures are not typically used on public streets, they are not "subject to registration," and therefore the Board lacked jurisdiction to hear GFL's protest.

On August 14, 2013, Administrative Law Judge Anthony M. Skrocki denied Capacity's Motion to Dismiss. The ALJ found that the Board had jurisdiction to hear the protest both because Capacity sells vehicles "subject to registration," and because GFL was given the right to perform authorized warranty repairs and service.

After the ALJ denied the Motion to Dismiss, but before the hearing on the merits, the parties entered into two stipulations of fact, one dated October 11, 2013, and another dated December 2, 2013. Among other things, the parties agreed to stipulate to the following facts concerning the "good cause" factors set forth in Vehicle Code § 3061:

- GFL transacts an adequate amount of business, as compared to the business available to it.
- GFL has made investments and incurred obligations necessary to perform its parts of the franchise.
- GFL's investment in its franchise is permanent.
- GFL has adequate motor vehicle sales and service facilities, equipment, vehicle parts, and qualified service personnel to reasonably provide for the needs of the consumers for the motor vehicles handled by the franchisee and has been and is rendering adequate services to the public.
- GFL does not fail to fulfill the warranty obligations of the franchisor to be performed by the franchisee.

The parties also stipulated that they will not present evidence regarding whether it would be injurious or beneficial to the public welfare for GFL's business to be disrupted. The only "good cause" factor to which the parties did not stipulate was the one forming the basis for Capacity's termination: the "[e]xtent of [the] franchisee's failure to comply with the terms of the franchise," and specifically whether GFL breached the terms of its franchise agreement by allowing its former employee to access Capacity's confidential and proprietary "Online Parts Ordering System" (also known as "COPOS").

On December 11, 2013, a hearing on the merits of the protest was held before ALJ Kymberly Pipkin. In March of 2014, ALJ Pipkin issued a 15-page proposed decision, sustaining the protest and prohibiting termination of the GFL franchise. The ALJ found that GFL's principal, president, and sole shareholder, Denise Rosen-Kendrick, misrepresented the employment status of former employee, Stephen Mehrens, to Capacity, stating that Mr. Mehrens was on medical leave when he actually was no longer employed with GFL. The ALJ also found that Ms. Rosen-Kendrick provided Mr. Mehrens with the password to access COPOS after he was employed by a competitor of Capacity.

Nevertheless, the ALJ concluded that Capacity did not establish that GFL violated any provisions of the franchise agreement or that GFL failed to comply with the terms of the franchise. Thus, the ALJ concluded that Capacity did not meet its burden to establish good cause to terminate GFL's franchise.

The ALJ found that the agreement provisions described in Capacity's notice of termination were not violated because they were not actually contained within the agreement; they were provisions added to subsequent franchise agreements with other franchisees. The ALJ found that the sole clause in GFL's franchise agreement regarding Capacity's ability to terminate provides as follows:

> For good cause shown, as defined by Texas statute, Capacity may terminate this Agreement without any liability by providing written notice of termination which shall be effective thirty (30) days after receipt by Authorized Representative [GFL]. Cause shall include but not be limited to the goals and objectives established by the parties hereto.

The ALJ found that this provision was not violated by GFL's conduct.

In April 2014, the Board met and considered the proposed decision. The Board adopted the proposed decision as its final Decision by a 2 to 1 vote. Board member Kathryn Doi wrote a four-page dissent.

By the present action, Capacity seeks a peremptory writ of administrative mandamus ordering the Board to set aside its decision and issue a new decision overruling the protest. In its Memorandum of Points and Authorities, Capacity challenges the Board's Decision on two grounds. First, Capacity challenges the ALJ's order denying the Motion to Dismiss. Capacity argues that because terminal tractors are not typically "registered," the Board did not have jurisdiction over GFL's protest.

Second, Capacity argues the Board abused its discretion in finding GFL's conduct did not violate the terms of the franchise or otherwise provide "good cause" to terminate the franchise. Capacity argues that, based on the undisputed facts, Capacity had good cause to terminate GFL's franchise due to GFL's breach of the implied covenant of good faith and fair dealing and GFL's violations of state and federal laws prohibiting the unauthorized dissemination of trade secrets.

Standard of Review

The inquiry in a case under Civil Procedure Code section 1094.5 shall extend to questions whether the respondent has proceeded without, or in excess of jurisdiction; whether there was a fair trial; and whether there was any prejudicial abuse of discretion. Abuse of discretion is established if the agency has not proceeded in the manner required by law, the order or decision is not supported by the findings, or the findings are not supported by the evidence. (Civ. Proc. Code § 1094.5(b).) Where it is claimed that the findings are not supported by the evidence, abuse of discretion is established if the findings are not supported by substantial evidence. (*Automotive Management Group, Inc. v. New Motor Vehicle Board* (1993) 20 Cal.App.4th 1002, 1009.) However, if the facts are undisputed, the reviewing court may exercise its independent judgment and resolve the matter as a question of law. (See *Paratransit, Inc. v. Unemployment Ins. Appeals Bd.* (2014) 59 Cal.4th 551, 562.)

Motion to Augment the Administrative Record

The administrative record originally lodged with the court inadvertently omitted the parties' joint exhibits and the transcript of the hearing. At the hearing on the merits, Capacity moved to augment the record to include the omitted documents. GFL had no objection to augmenting the record to include the joint exhibits and transcript of administrative hearing. Thus, the court granted the motion to augment the record with such records.

Discussion

The Board did not abuse its discretion in denying Capacity's Motion to Dismiss. The court finds the ALJ's Order Denying Respondent's Motion to Dismiss and Strike Protest to be well reasoned and well supported. The court adopts the findings and conclusions of that Order as its own.

However, the Board abused its discretion in concluding that Capacity lacked good cause to terminate GFL's franchise.

As Section 3061 recognizes, good cause is a "relative" term; its existence depends on the circumstances of each particular case. Broadly speaking, a right to terminate "for good cause" means upon reasonable grounds assigned in good faith. (See, e.g., *R. J. Cardinal Co. v. Ritchie* (1963) 218 Cal.App.2d 124, 146.) Where, as here, the facts are undisputed, the existence of good cause for termination is an issue of law, reviewed de novo.[1] (*Norman v. Unemployment Ins. Appeals Bd.* (1983) 34 Cal.3d 1, 6; *Moore v. May Dept. Stores Co.* (1990) 222 Cal.App.3d 836, 840.)

Here, the Board found that Ms. Rosen-Kendrick misrepresented the employment status of Mr. Mehrens to Capacity, stating that Mr. Mehrens was on medical leave when, in fact, he was working for a competitor. The Board also found that Ms. Rosen-Kendrick provided Mr. Mehrens with GFL's password to access COPOS after Mr. Mehrens was working for the competitor. Mr. Mehrens proceeded to access the COPOS system no less than thirty-nine times, on nine different days, researching eight different VINs and 13 different parts.

Only authorized dealers are supposed to have access to the COPOS system. By providing Mr. Mehrens with access to the COPOS system, GFL violated the terms and conditions of use of the COPOS system and gave Capacity's chief competitor access to proprietary and confidential trade secret information about Capacity's business. GFL also was dishonest to Capacity about Mr. Mehrens' employment status, which prevented Capacity from suspending his user ID before he could gain access.

These actions violated the terms of the franchise agreement, which requires GFL to "use all reasonable endeavors to achieve maximum sales of [Capacity's] products." By providing trade secret information to Capacity's chief competitor, GFL worked against Capacity and acted inconsistent with its obligations under the franchise agreement. This is "cause" for termination under the express terms of the agreement.

[1] Because the Board's findings of fact are not disputed, the court accepts them as true. (See *Black v. State Personnel Board* (1955) 136 Cal.App.2d 904, 909 [any finding not specifically attacked is to be accepted as true].) The Board's findings are incorporated herein by reference.

Further, under applicable Texas law,[2] there is a duty of good faith and fair dealing between the parties to a motor vehicle franchise agreement. (See Tex. Occ. Code Ann. § 2301.478[3]; *Buddy Gregg Motor Homes, Inc. v. Motor Vehicle Board* (Tex. App. 2005) 179 S.W.3d 589, 615; see also Tex. Bus. & Com. Code § 1.304.) GFL's actions breached this duty of good faith. Thus too supports the conclusion that GFL failed to comply with the terms of the franchise.

Moreover, a finding of good cause is not required to be based on a violation of franchise "terms." The statute merely requires a showing of "good cause," which can be based on any "existing circumstances." Here, GFL's dissemination of Capacity's valuable trade secrets, and GFL's violation of Capacity's trust and confidentiality, would amount to good cause for termination even if it did not violate the terms of the franchise agreement.

<u>Disposition</u>

The Board abused its discretion in concluding that Capacity failed to establish good cause to terminate the franchise agreement. Accordingly, the court shall grant the petition and issue a peremptory writ of mandate compelling Respondent to set aside its decision and issue a new decision, overruling the protest and allowing termination of the franchise agreement.

Counsel for Capacity is directed to prepare a formal judgment (incorporating this ruling as an exhibit) and writ; submit them to opposing counsel for approval as to form; and thereafter submit them to the court for signature and entry of judgment. Capacity shall be entitled to recover its costs upon appropriate application.

Dated: August 3, 2015

Hon. Timothy M. Frawley
California Superior Court Judge
County of Sacramento

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[2] There also is an implied covenant of good faith and fair dealing in every contract under California law. (See *Comunale v. Traders & General Ins. Co.* (1958) 50 Cal.2d 654, 658.)

[3] Although the franchise agreement was executed before this statute took effect in 2003, the agreement had a one-year term, subject to annual renewal by mutual agreement of the parties. Thus, the agreement was "renewed" after the statute took effect. The duty of good faith imposed by the commercial code predates the franchise agreement. (See *Adolph Coors Co. v. Rodriguez* (Tex. App. 1989) 780 S.W.2d 477, 480-81.)